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THE SUPREME COURT DECISIONS

THE JUDGMENT

BY PETER S. GROSSCUP

THE request of the REVIEW for an article on the decision of the Supreme Court in the Standard Oil case does not, I take it, call for a review of the decision as it affects the particular case of the Standard Oil Company; nor a review of the purely legal grounds upon which the court shifted its interpretation of the Sherman Act from that adopted in the Trans-Missouri case, decided in 1897, to that adopted in the present opinion. Such a review would be interesting chiefly to lawyers; and to lawyers as lawyers, no exposition need be added to that contained in the opinion of the Chief Justice.

The interest of the public in the interpretation just given to the Sherman Act by the Supreme Court is because it is a decisive *event*—as the Dred Scott case fifty years before was a decisive event—in the line of events along which the political and economic life of the nation travels. Like the Dred Scott case, the significance of the decision is not in what was done with the particular matter before the court, but what was laid down as the law governing such matters in general. As in the Dred Scott case, the court here traveled away from the particular case in hand, that the decision might settle once and for all what is now, as what

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was then, the most prominent question in the public mind. And, as in the Dred Scott case, when the smoke has cleared away it will be found that nothing permanent has been settled—that issues as deep as the cause that now underlies the public unrest are not finally settled by *any* pronouncement that does not proceed from the public mind, made up in its own way and after its own processes of arriving at conclusions. But here the resemblance ends; for, unlike the Dred Scott case, what the court in this case has laid down as the law is not mere dicta—what the court laid down respecting the reasonableness or unreasonableness of restraint of trade to bring it within the prohibition of the act was essential to arriving at a definition or standard by which the particular case might be measured; and, unlike the Dred Scott decision also, this Standard Oil decision, instead of cumbering the ground, completely clears it for the beginning of what I believe will be the public's final way of settling existing problems.

When this number of the REVIEW is issued the Sherman Act will just have become of age—it was passed July 2d, 1890. The first third of its life was a period of coma—though written into the book of laws, it did not stir. Then came the Trans-Missouri case—a case of railroads in alleged combination respecting rates. Here for the first time the services of the interpreter were called for. In strict letter the act prohibits "every contract combination in form of trust or otherwise or conspiracy in restraint of trade." No qualifying words are in the language of the act. The argument of the railroads in the Trans-Missouri case was that the act was meant to prohibit only unreasonable restraint of trade; that it was only unreasonable restraint of trade that was prohibited at common law; that the act was only the re-enactment of the common law into the jurisprudence of the United States, because as a sovereignty separate from the States, the United States, in the absence of statutory re-enactment, would have had no such provision of the common law. But the majority of the Supreme Court, one justice dissenting, said, No—they would not "read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government"; the qualifying word "unreasonable" was not in the language of the act—the court would not write it in. And thus the act stood—the reasonableness or unreasonableness of

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the restraint of trade involved in each case being immaterial —for the next fourteen years and until the majority of the court, speaking in this Standard Oil decision, now says that the word "unreasonable," though not written in so many syllables and letters into the language used, was as effectively there as if so written.

It would be mere hypocrisy to say that the court has not turned upon itself. What the court fourteen years ago said was not in the act the court now says *is* in the act. Meantime not a letter of the act has been changed. What has changed is the attitude of the public mind—the public mind, informed by this fourteen years of experience. There are windows in the Supreme Court room from which what is going on in the world outside is in plain sight. The interpretation put upon the act fourteen years ago was hailed at that time as the people's salvation from impending conditions. The *repeal* of that interpretation in the opinion now filed is hailed again as a rescue of the people from impending conditions. Why this abrupt turn and this rapid march "on the back track"? Or is it the *back* track?

The explanation is that the Sherman Act as previously interpreted was a wholly misconceived and misdirected public experiment. It was loaded with disappointment to those who sincerely are looking forward to a national prosperity more widely distributed, and with dynamite to those whose interest is wholly in the present. As a road to restored "individualism" in trade and commerce it led nowhere; every one of its boasted achievements, like the Northern Securities case, for instance, faded entirely away the moment the last line of the decree had been written. The "dissolutions" were dissolutions on paper only; they produced no effect either on the conditions of trade or the relation of individual men to opportunities in trade. Where change followed at all, it was in the direction not of individualism, but of more intensive concentration—the previous constituent corporations welded into single corporations—thereby replacing what in law was a "combination" by what in law was a single entity, as in the steel and other industries. And as a road to better business and economic conditions the act had brought the country to the edge of the volcano. It was inevitable that an experiment of that kind would be stopped some time by somebody.

To more clearly understand this let us look at the Sher-

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man Act, as previously interpreted, first in perspective and then at its workings in some detail. In their beginnings, commerce and industry were matters carried on by individuals. There were no railroads; transportation was carried on by wagons and stage-coaches; these could easily be commanded by the means of single individuals. Even the ships were so small that a single individual who by no means would be considered rich now could own and sail them. The shops were small; one sees them yet in Europe, the property of an individual. The big factory was unknown; shoes were purchased of the shoemaker, harness from the harness-maker, cigars of the cigar-maker, flour from the town miller, and clothing from the weaver. Steel there was none. Iron was forged in John Smith's furnace and coal came out of Dan Jones's coal-mine. Commerce and industry were almost entirely individual. There were few combinations or occasions for combination, and there were no monopolies except those that had been expressly granted a monopoly. Competition was *in fact* as well as in law the order of the times; and to safeguard competition, combinations that were shown to be hurtful, and monopoly, except such as was granted by the sovereign, was prohibited. It was on this state of facts that the whole law on the subject of combination and monopoly had its beginning. Compactly stated, that principle of law was that, aside from those to whom monopoly had been expressly granted, there should be no monopoly whatever and no *unreasonable* restraint of trade by any kind of contract or combination between individuals.

But in time the economic current changed. Invention came—the forces of matter unlocked by the human mind—and with that came transportation by railroad, much too great an undertaking for any single individual; manufacturing was turned from the little shop, each owned by a worker, to the factory; great mills took the place of the town mill; the steel and iron industries required furnaces so immense that only capital united could build and operate them; and a locking together of ore-fields and coal-fields, placed by nature thousands of miles apart, that only a *still larger* union of capital could bring together; so that commerce and industry in all their larger phases became corporate instead of individual. And this, too, in the face of the fact that in essence every corporation, even the smallest, was to a certain degree combination in restraint of trade. But no

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hurtfulness was yet discovered in the restraint of trade resulting.

In time, however, the larger of these corporations became not merely corporate combinations of what otherwise would be individual capital and effort, but monopolies even. Railroads, street railways, telephone and telegraph companies, lighting companies, are all natural monopolies. Two or more railroads between large terminal cities cannot compete with each other in the old sense of competition without either bankrupting themselves or bankrupting all the intermediate country. It was out of competition that the whole system of rebates grew. And some of the larger corporations in commerce and industry, by getting control of trade, have *made* themselves monopolies. The "fact" that modern enterprise operates, and must operate, through combinations, and even monopolies, has become so obvious that every one sees it—every one except the "law." The "law," until this latest decision of the Supreme Court, refused to see it—refuses even now to see it to the extent that monopoly is in some fields of enterprise a helpful figure—that is, the "law" refused and even now partially refuses to accept the whole logical sequence of the times. That the fact cannot be gotten rid of—that it is a necessary sequence of modern conditions—every intelligent mind saw, every intelligent mind except the mind of the "law." The "law," in outward appearance at least, was constantly redoubling its effort to get rid of the fact. At common law, when there was little economic necessity for combination between individuals, only combinations *unreasonably* restraining trade were prohibited. Now, when every great enterprise is carried on by combination the law proclaimed, until this decision came down, that no combination that even tends to limit competition, whether reasonably or unreasonably, shall exist at all—pretended to outlaw what plainly exists in every field of enterprise and plainly must exist so long as it is not unreasonably exercised. In other words, the currents of "law" and "fact" respecting monopoly and combination, instead of running side by side as they should run, took to running in opposite directions. When I go to my tailor for a suit of clothes I expect him to fit me, not that he cut me down or fill me out to fit the clothes—it is the surgeon only who cuts into growth. The law is a garment and should be made to fit enterprise wherever enterprise is not hurtful—

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enterprise not hurtful should not be trimmed to fit the law. It was inevitable, I repeat, that this should be stopped some time by somebody. Economic evolution, the product of millions of contributing causes, is a growth as certain and irrepressible as any growth in the natural world; the law can no more *artificially* change this growth than it can paint the lily or give another fragrance to the rose.

To illustrate what such artificial interference with economic evolution means, let me suppose the case of a combination dealing in a commodity that grows everywhere—that cannot be monopolized by the process of getting under one control all the sources of production. The *combination*, let us say, is clearly proven—it has its purchasers in every section where the commodity grows and its sellers in every market where it is sold.

But the *price to the producer* is not reduced. On the other hand, it is increased; and more than that, it is steadied—the abrupt fluctuations of the old haphazard methods have disappeared.

The *cost to the consumer* is not increased. The consumer pays no more, pays less, in fact, than he would pay under the old unorganized method of purchase and distribution.

The *quantity* of production is not reduced. On the contrary, it is increased, because organization has increased consumption. Trade, as "trade" is generally understood, instead of being restricted is expanded.

Now add to this another element, unfortunately not now the fact (the previous elements are facts in many of the big combinations in the country), the *number of people* who get a profit out of the business is not reduced; the combination has as its *stockholders* those who otherwise would be the individual *competitive* dealers.

None the less, even though this last element were the fact also (and the Sherman Act will never contribute an iota to making it the fact) the combination supposed, under the Sherman law as previously interpreted, would be unlawful. In other words, though production as mere production is not restrained, rather increased; though the quantity of commodity dealt in is not restrained, rather increased; though the producer is benefited; though the consumer is benefited; though the profit there is in the business of buying and selling is as widely distributed among the people as before; though all these things are true so that economically

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the combination is a benefit, it was none the less unlawful. *Why?* Solely because by utilizing organization to cut down expenses and waste, the organized industry *can afford* to pay the producer more, *can afford* to sell to the consumer at a less figure, can outrun, in the matter of cutting down cost, individual competition in the race from the producer to the consumer, *thereby* obtaining the business. In other words, the combination was unlawful because, and solely because, *inherent in organization* are these economic advantages.

In no place was the misplacement of the Sherman Act as previously interpreted more clearly exhibited than in its application to the railroads of the country. Carriers, as already stated, are natural monopolies. In the matter of rates, they are subject to the will of the Interstate Commerce Commission, the State commissions, and the courts. Active competition under such circumstances is simply waste, to be made up afterward, if it is made up at all, by excessive rates. It is enough that to these carriers the State says: "You must not charge excessive rates, nor discriminate between people, nor between localities, nor give inadequate service." The commandment is reasonable and is sufficient and plainly is, "Thou shalt not." But how shall the carrier obey this command? Like the putting together of an old-fashioned stove-pipe—successfully hammered out here only to find out that it no longer fits there—the making of rates that are reasonable and non-discriminative is a difficult and complex matter. In a country as expanded as this, with cities and localities served by as many different railway lines as serve some of our cities and localities, this fixing of rates that are reasonable and non-discriminative requires conference. The natural thing is to confer. But turn over the page of the statute-book on which you have been reading the Interstate Commerce Act. On that next page is the Sherman Act. That as previously interpreted runs, "Thou shalt not confer." And it availed nothing to say that the two commandments were in contradiction of each other—that one could not be obeyed without violating the other. "Thus saith the law" was the answer—let the bewildered carrier find his own way out.

The practical result of the Sherman Act as previously interpreted was that not only the carriers of the country and the so-called big trusts of the country, but nearly every business of every character was put literally "under the

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condemnation of the law." Nearly every business movement with spirit in it became a national sin. And there was no escape from the wrath to come, except to make one's peace with the executive authorities at Washington. Of course no President or Attorney-General ever wished to bring havoc to business. No mere self-seeking President or Attorney-General would wish to bring havoc to business, for that would be to drift against Charybdis on the one side of the political channel to be sailed. There was never a day, therefore, that the law was executed, or that any one intended it should be executed, against *all* who fell literally under its condemnation. But on the other side of the political channel to be sailed is always the Scylla of a natural public hunger that somebody be prosecuted. And right there the right kind of a political pilot could show his usefulness. In other words, the Sherman Act as previously interpreted put the question of who should be made to feel the condemnation, and who should be exempt—all, literally, being under one condemnation—within the discretion of the political branch of the Government. Who should be punished for violating the law was a province transferred from the courts to the Executive; and the transfer, unobserved as it was, was nothing less, as some one—Judge Lacombe, I think—has already said, *than revolution in every ideal of English and American jurisprudence.* This latest interpretation of the Sherman Act, in determining that the restraint of trade must be unreasonable to be within the prohibitions of the act, restores the question of punishment to the courts, for hereafter the reasonableness or unreasonableness of the restraint will be a judicial question to be determined by the courts. This latest decision is *the counter revolution.*

One word more. From the view-point of the business man and his lawyer it is plain that the Sherman Act, even as now interpreted, is still not definite; that no business foresight can discern what restraint of trade incidental to business may be held by the courts to be reasonable and what unreasonable; that every push of enterprise forward is to enter upon uncharted waters. And to a certain degree this is true. But it is likewise true of other liabilities prescribed by the law, such as "reasonable care" in one's relations to the safety of others, or what is called fair dealing or fraud in one's dealings with others, for in the nature of these and many other obligations laid upon men the definition must

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be general; no wisdom could devise particular definitions in advance that would meet a tithe of what is bound to happen. And it seems to me no greater hardship here than elsewhere that men who enter these fields should exercise their light of reason honestly on matters under contemplation or take the consequences. The business man who will study the effects of his contemplated acts upon the rights of others, as free from the mists of self-interest as he studies the effects of the acts of others upon his rights, will not be in any great danger of being misled into disobeying the law.

On the other hand, there is a growing consciousness that modern economic methods and tendencies are chiefly in the interest of the *special* man. Where will the ordinary man be left, in his relation to those living interests that immediately environ him — food, clothing, shelter, means to educate his children, a share in his country's growing property—where will the ordinary man be found when this new age once permanently settles into form? That the ordinary man, at every step he tries to take toward a personal independence, has to yield up from his day's wage to some of these combinations, as the price of his right to live, more than they are justly entitled to take, no one doubts. That the whole field of corporate investment is permitted to be so set with pitfalls that what the ordinary man succeeds in saving cannot be profitably invested with safety, no one can doubt. The special man is safe. But where will this new age leave the ordinary man in those personal interests that are closer to him than anything else in life?

From the view-point of a large number of those to whom this inquiry is a matter of deep concern, perhaps a large majority yet, the Sherman Act, as it now stands interpreted, will look like a gun from which the load has been extracted. As a *weapon* it will look dismantled. As a mere weapon it *is* dismantled. If in the interests of the ordinary man these modern economic methods and tendencies must be overhauled and destroyed—if union of effort and capital solely because it is effort and capital *in union* must be circumvented—this latest decision has drawn the load of the only gun thus far trained against the enemy. But it was a gun, that whatever the terror of the explosion, never fired anything other than blank cartridges. And in the development of ways to secure to the ordinary man his rights in the world in which he lives this formidable-*looking* weapon, dismantled

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and abandoned, is of infinitely greater service than when in fruitless action, for though it accomplished for the ordinary man nothing that really counted, it kept him and those who have his interest in mind from looking elsewhere for immediate means against existing wrongs. Indeed, the paramount benefit of this latest decision, to my mind, is that it will bring the public mind to discern that we *are* in a new age in which combinations and monopolies even are economic necessities; and that being here, as the necessary economic equipment of the times, the thing to do with them is not to train guns on them as if they ought not to be here at all, but to so safeguard them as forms of investment and so limit them in dividends allowed to be paid (their rights are State given only, not the rights of natural persons) that they will have no motive to deal otherwise than fairly with the people, and will become also, as property investments, representative of the people. Why should we continue longer to waste our energies in trying to undo what is ordained by an economic law as inexorable as any law of nature; why not, on the contrary, lay hold of it, utilize it, and broaden it, to the highest uses of mankind, just as scientists and inventors have laid hold of the laws of nature, utilizing them and broadening their use, until they have become the common possession of mankind. It is just here —the clearing of the ground for intelligent progress in behalf of the masses—that this decision is an *event—a turning event* in the life of the nation.

PETER S. GROSSCUP.

"THE REASON"

BY WILLIAM J. BRYAN

THE decision of the United States Supreme Court in the Standard Oil case—and the language of the opinion is repeated with emphasis in the Tobacco case—is epoch-making, although people will differ as to the character of the epoch which it ushers in. There are a number of things that impress one as he reads the majority and minority opinions, and the impression made is so deep that feeling increases with contemplation. It is easier for the public to discuss the subject in diplomatic language now than it will be when the far-reaching effect of the decision is fully understood. The position one takes in regard to the majority and minority opinions depends largely upon the point of view from which

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he looks at the trust question. Those who regard the trust as a benevolent institution, or as a natural and necessary economic development, will be likely to approve of the position taken by the majority of the Court, and if they approve of the position taken by the Court they will quite naturally indorse the reasons given. Those, on the contrary, who look upon the trust as a real menace to economic independence and to our political institutions will applaud Justice Harlan for having so vigorously dissented, even though in dissenting he stood alone.

Let us consider the position taken by the Court and the language in which the Court's position is stated.

First: The opinion was written by Chief-Justice White, and no one can fail to note the tone of triumph that runs through it. It exhibits something of the spirit of the "Battle Hymn of the Republic," "Be swift, my soul," "Be jubilant, my feet." But the Chief Justice can be excused for betraying something of the exultation of the conqueror. Judges are merely human beings, if in saying this I am not guilty of contempt—that is, "unreasonable" contempt—and we must expect to find in them some of the faults that appear in common clay. Fifteen years ago the Chief Justice, then Justice White, wrote the dissenting opinion in the Trans-Missouri Freight case, and in that opinion, in which three other justices joined him, he set forth the same doctrine that he presents with so much emphasis in the Standard Oil and Tobacco cases. His achievement in converting a minority into a majority is being loudly praised by those who agree with his conclusions. Even so conservative a journal as the Springfield (Massachusetts) *Republican* says:

> "How can we give a second place to Chief-Justice White, whose great achievement in bringing a long and sharply divided Court into practical unity on the famous statute of 1890 elevates him at once to the very first rank among the country's great judges, and makes him comparable with Chief-Justice Marshall alone in his demonstrated powers of judicial leadership,"

although the friends of the Chief Justice may think that this literary bouquet is robbed of some of its fragrance by the fact that the aforesaid journal refers to Justice Harlan as the "noblest Roman of them all."

The spirit of the successful gladiator oozes from the opinion—so much so that Justice Harlan in his oral opinion in the Tobacco case protests against a seeming reflection upon

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the distinguished jurists who joined in the opinion of the majority of the Court in the Trans-Missouri Freight case. Justice Harlan is quoted as saying:

"No one is more ready than I am to concede the ability of this Court as it is now constituted, excepting, of course, only myself. It never was stronger in all of its history than it is now perhaps; but I would be slow, as a member of this Court, on or off the bench, to say that such men as Melville W. Fuller, David J. Brewer, Henry Billings Brown, and Rufus W. Peckham did not know what the rule of reason was when they decided the Trans-Missouri Freight case and the Joint Traffic case. This Court was never stronger than it was on that day. It never had four men upon it that were wiser in the knowledge of the law and of the Constitution than the four men whom I am now mentioning, and yet we are told here to-day, as we were told in the Standard Oil case, that this Court decided those cases, great as they were, without any regard to the rule of reason. I think that those men knew what reason was, and knew what the light of reason was, and intended to apply reason; but we are so wise in this day and generation that we are prepared to say that our predecessors did not know what reason was, and decided cases of vast importance without any regard to the rule of reason. Others may say that; I won't."

Second: The next thing that impresses the reader of the opinion written by the Chief Justice is that "the rule of reason," which is presented as a great discovery, was not discovered by the Chief Justice, although he is its most distinguished exponent at this time. It was really discovered by those who were violating the law and was presented by the very learned counsel who attempted, at that time unsuccessfully, to convince the Court that the Anti-trust law did not mean what it said, or at least did not say what the Court, after a long hearing, declared that it did say. It does not detract, however, from the prestige of the Chief Justice that he was not the first to think of inserting the word "unreasonable" in a criminal law. The inventor is very often lost sight of—the man who makes the invention a success is the one who becomes known to the public—and the attorneys who attempted to use the word "unreasonable" as a shield to protect the defendants in the Trans-Missouri Freight case and later in the Joint Traffic Association case will have to content themselves with such consolation as they can obtain from the consciousness that they made the discovery (and from their fees), while the Chief Justice bows and smilingly accepts the plaudits of those who desired the repeal of the criminal part of the Anti-trust law and a paralysis of its usefulness in the civil courts.

Third: The fact that the Chief Justice has now with him

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all of the new members—those who have come upon the Supreme bench since " the rule of reason " was promulgated by him fifteen years ago—suggests an inquiry which, however interesting, cannot be answered—namely, *why do all of the new judges concur in what was at first the opinion of a minority?* Why is Justice Harlan, the only survivor of those who joined in the majority opinion fifteen years ago, the only dissenter to-day? If it was due to the persuasive powers of the Chief Justice, why is he so much more successful than he was fifteen years ago? If it were proper to assume that judges were appointed to the Supreme Court *because of their known views upon important questions,* it would be easy to explain the change in the Court, for the judges are appointed by the President, and it would not be difficult for a President to select from the large number of well-qualified lawyers those who held a particular view on an important question. Some influence might be exerted in the selection of judges, even without actual knowledge of their views on a particular subject, if the general sympathy of the applicant was known, his bias for or against a certain class. It is no reflection upon a man to say that he possesses one of the biases which run through society, the aristocratic and the democratic biases being the most fundamental. The plutocratic bias is also a fact to be dealt with, and a very important fact, too. A man is often unconscious of the bias that he has, and the bias is, as a rule, more pronounced in proportion as the possessor is unconscious of it; and it is more likely to influence him, too, when unconscious. If a man is conscious of a bias for or against a certain class he is on his guard, and in his effort to overcome it he may lean to the other side; it is the man who is unconscious of his bias who is likely to go to an extreme, and that, too, with perfect honesty of purpose.

Opinion on the trust question is largely a matter of bias; it is a question for the heart as well as the head. It is a poor head that cannot find reasons for doing what the heart wants to do. It is a fundamental " rule of reason " that a man can generally find a reason—not always conclusive and sometimes not even plausible, but a reason sufficient for himself—for doing anything upon which his heart is really set. If bias is admitted—bias in the President as well as in the judge—it is entirely possible that a President might unconsciously select judges who would, without any pre-

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vious pledge, agree quite naturally with those who represent their side of the great fundamental issues that divide society. If it "just happened" that in the selection of eight judges *all* should take the view of Justice White, and if it is *not* accounted for by bias on great subjects, then it shows what a lottery is conducted at the White House when the President blindfolds himself and picks judges at random, only to find that all the prizes have gone to those who do not fear "reasonable" trusts and none to those who oppose all restraint of trade.

Fourth: Another thing that strikes one as he studies the opinion of the Court is that the Court's decree is entirely lost sight of in the reasons set forth. The Court decided that the Standard Oil Company (and also the Tobacco Company) violated the law, and it ordered a dissolution. But even the defendants did not seem to regard the order as of any serious moment, while the reasons given by the Court have aroused the entire nation, and this submerging of the immediate result is the more remarkable when it is remembered that the language which has startled the country *was not necessary to the decision of either case.* Justice Harlan calls attention to this fact quite pointedly. In the oral opinion delivered in the Tobacco case he said:

"More than that, and still more than that, it is a very serious matter. What does it matter, so far as this case is concerned, whether that act of Congress contains the word 'reasonable' or does not contain the word 'reasonable'? We all agree—every man on this bench agrees—that this is an organization in violation of the act of Congress, whether the 'reasonable' is or is not in the act. It is a violation of a law of Congress. Then why could not this Court have said, under these facts, 'This corporation violates a law of Congress' and stop there—and stop there? Why was it necessary for us to go into an elaborate and ingenious argument, worthy of the genius of the Chief Justice, and attempt to show that this act should be interpreted as if it contained the word 'reasonable' or the word 'unreasonable'? Whether it contains those words or not is of no consequence in this case under this act. If there ever was a case since the organization of this Court in which a vast amount of an elaborate and able opinion is pure *obiter dicta—obiter dicta* pure and simple—it is the opinion delivered by the Court in this case as to the construction of this Anti-trust Act of 1890. I cannot escape that conclusion."

As Justice Harlan well says, in order to find the defendant companies guilty it was not necessary for the Court to discuss the question of reasonableness or unreasonableness, for in both cases the Court decided that the defendants were guilty even if the Anti-trust law were amended so as to pro-

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hibit not every contract in restraint of trade, but only contracts that unreasonably restrain trade. The Court might have met the arguments of counsel for the defendants by saying:

"The question which you raise is immaterial and irrelevant. It is not necessary for us to decide whether the defendants would be guilty if the statute were construed according to the contention of the government. We may assume for the purposes of this case, without deciding the question on its merits, that the law reads as you say it ought to read, still defendant companies are guilty of not only unreasonable restraint of trade, but of outrageous and inexcusable restraint of trade. They cannot hope to escape under any construction of the law. In finding against them, however, it is not necessary for us to consider hypothetical cases. We are dealing with the cases before the Court. These defendants are undoubtedly guilty. They are guilty of clear and unmistakable violation of the law, and they cannot escape the consequences by questioning the language of the statute; they would be guilty if we construed the statute, as they ask, to prohibit only unreasonable restraint."

The Court might have said this, and if it had done so it would have been acting in harmony with precedent; but instead of doing this the Court goes out of its way to interpret the law, not for the benefit of those then before the Court, but for the benefit of those who may hereafter be brought before the Court. The public recognizes that the decision is important, not because of its effect upon the Standard Oil Company and the Tobacco Company, but because it furnishes a new interpretation of the law—an interpretation that brings a smile to the face of every trust magnate, but arouses deep concern in the breasts of those who regard a private monopoly as indefensible and intolerable.

Fifth: The decision of the Court is so revolutionary that it not only reverses a decision that has stood for fifteen years, but it amends a law, enacted by Congress, which the Court refused to amend in the Trans-Missouri Freight case. It is true that Chief-Justice White, then an associate justice, dissented, but according to our law the decision of the majority of the Court stands as the decision of the Court—even when that majority rests upon the opinion of one justice; and to make it stronger still, even when the opinion of that justice has changed between two arguments of the case, as did the opinion of one of the justices in the Income Tax case. It is no slight matter for the Supreme Court of the United States to reverse itself upon an important question, because a reversal cannot but affect rights based upon

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the former decision and interests built up upon that decision as a foundation. But the reversal of a former decision is the more serious when such reversal involves an encroachment upon the legislative branch of the government. Justice Harlan in his dissenting opinion very properly calls attention to the language of the Court when this identical question was before it in the Trans-Missouri Freight case. He quotes the following from the decision in that case:

"To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances, we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this Court by a process of judicial legislation wholly unjustifiable."

It will be seen that the Court at that time not only refused to amend the Anti-trust law by inserting the word "reasonable," but declared that it had no constitutional right to do so. The Court now does the very thing which the Court then declared to be unconstitutional. What higher condemnation is there than condemnation spoken by the highest Court of our land? Of course the last decision supersedes any former decision. If the Court declares to-day that the insertion of the word "unreasonable" in the Anti-trust law would not be judicial construction, but a legislative act prohibited by the Constitution—if the Court decides that to-day, and next year a new set of judges reverse the decision, the new decision would stand as the supreme law of the land, but it would not lessen the moral weight of the former de-

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cision. The Court which decides that it has no right to exercise a certain power—thus deciding against itself—must have weight with an unprejudiced mind, even though the Court, composed of different judges, decides later that it possesses the power formerly denied. We understand the natural tendency to enlarge upon one's powers—a tendency from which courts are not entirely free, and we cannot at once rid our minds of the impression that the opinion of the former court deserves careful consideration.

Under our Constitution the Court has the final word as to a law, and the only way in which the public can protest against judicial legislation is through the legislative branch of the government. While the Constitution divides the Federal Government into three branches, each independent of the other, it gives to the Supreme Court the power of interpretation, and this transcends for the time being the powers vested in the Legislature. But the people are not mocked; they can by legislation restrict the construction of the Court and prohibit a construction which will nullify a statute.

Then, too, the people can reach a Court through the changes that are constantly occurring in the personnel of the Court. It would have been difficult fifteen years ago to conceive of such a change in the Court as would result in an eight-to-one decision overruling the decision of that date, but, since such a change has taken place, it is possible to conceive of another change during the next fifteen years that will bring at least a majority of the Court back to the rule that prevailed before the so-called "rule of reason" took violent possession of the Court. It is possible also that Congress may see fit to express its disapproval of the construction placed upon the Anti-trust law by the Court in the Standard Oil and Tobacco cases. It may see fit to pass some of the bills already introduced by specifically declaring that the law prohibits all restraint of trade—not merely unreasonable restraint.

While I think that this ought to be done in order that the present law may not be robbed of such strength as it possesses, such legislation should be accompanied by further legislation that will fix arbitrarily the percentage of the total product which one corporation can control. The law as it formerly stood and as it was previously construed was uncertain enough—it was difficult for a corporation to know exactly what it might or might not lawfully do, but

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this uncertainty is greatly increased by the insertion of the word "unreasonable." The Democratic platform of 1908 set forth a remedy which would, in the opinion of those who urge it, afford substantial relief to the public without doing injustice to any corporation. The platform plan contemplates the licensing of any corporation engaged in interstate commerce when that corporation controls as much as twenty-five per cent. of the total product; corporations controlling a less proportion would not be affected by the plan. Corporations taking out the proposed license would be subject to any restrictions that Congress thought necessary to the proper conduct of their business as well as to the laws of any State in which they did business, and no corporation would be permitted to control more than one-half of the total product. We should have this additional legislation clearly and specifically drawing the line between the corporations engaged in legitimate work and the corporations which are engaged in unlawful transactions. Such legislation is demanded in the interest of the public and in the interest of legitimate business as well. It is not right to assume that any large percentage of our business men desire to engage in transactions which are harmful to the public, and those who are engaged in intentional wrongdoing should be segregated and subjected to punishment. Legitimate business has too long had to bear the odium thrown upon it by those guilty of conduct indefensible in morals as well as repugnant to the letter and spirit of the statutes.

Before passing from this branch of the subject, it may be worth while to inquire whether the Court, in entering upon judicial legislation, does not encourage those who favor a change in the method of selecting judges. Whatever may be said in favor of the appointment for life of men engaged in *interpreting* the law, no good reason can be given for the appointment, especially for life, of a *legislative* body. Nothing is more abhorent to our institutions than an appointive legislative body. Even the United States Senate is elective, and its members hold office for a specified term, and yet the sentiment in favor of popular election is so strong that we are upon the eve of a change which will make Senators elective by direct vote of the people. If the Supreme Court is to become a legislative body, what reason can be given for not making it elective also? The people

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would submit much more willingly to judicial legislation if they had a chance to elect the judges for fixed terms. Will they consent to legislation on important questions by a Court whose members are not only *appointed* by the President, but appointed *for life?* Justice Harlan thus answers the question:

"Nobody can tell what will happen. When the American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the Government, and by judicial construction only is declaring what is the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people with all sorts of opinions—are not going to submit to the usurpation by the judiciary of the functions of other departments of the Government and the power on its part to declare what is the public policy of the United States."

Sixth: Attention has been called to a number of questions raised by the decision of the Court, but there is one point which, above all others, challenges the attention of the public at this time. What will be the effect of the Court's decision on the statute which it *construes* (to use its language) or (to use the language of the dissenting justice) *virtually repeals?* The Anti-trust law of 1890 reads: "*Every* contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, etc." The Court declares that the statute should be constructed (or amended) to read: "Every contract, combination in the form of trust or otherwise or conspiracy, in *unreasonable* restraint of trade or commerce, etc." Of one thing there is no doubt—namely, that this construction or amendment of the law excludes from the penalties of the act *some* corporations that might, by the construction placed upon it fifteen years ago, be found guilty of a violation of the law. That is, it *lessens* the number of corporations to which it applies, and to this extent *weakens* the law as a protection to the public.

To understand this decision we must remember that after the decision of fifteen years ago the great corporations attempted to secure an amendment to the law *exactly in line with the present decision.* While this effort has been continuous, it is only necessary to refer to the attempt cited by Justice Harlan in his dissenting opinion. This instance is used not only because it is a recent attempt (made in 1909), but because the Judiciary Committee of the Senate

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filed an elaborate report, setting forth the reasons why the word "unreasonable" should not be inserted in the law. No one will accuse our Senate of being *unreasonably* hostile to big business interests even to-day, and it was still less hostile two years ago. The changes that have occurred during the last two years have very considerably increased the number of Senators who are opposed to the trusts and opposed to the control of industry by them. Yet even two years ago the Judiciary Committee of that body expressed its disapproval so vehemently that the attempt to change the law was abandoned.

The report submitted by the Judiciary Committee at that time ought to be read by every one who desires to acquaint himself with the subject under discussion. It pointed out the absurdity of using as precedents cases which dealt with contracts between individuals and which affected themselves only. Even one not learned in the law can understand that a contract should be construed more strictly against those who make it than against those who are not parties to it. A contract by which one agrees not to engage in the same business under certain conditions is to some extent a transfer of the good-will of the business. An entirely different rule ought to apply where two or more parties enter into a contract to drive a third party out of business. Justice Harlan quotes as follows from the report filed by Senator Nelson, Chairman of the Judiciary Committee:

"The Anti-trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute *indefinite and uncertain*, and hence, to that extent, *utterly nugatory and void*, and would practically amount to a *repeal of that part of the act*. And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of the People *vs.* Sheldon, 139 N. Y., 264, Chief-Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agree-

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ment was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' To amend the Anti-trust Act, as suggested by this bill, would be to entirely *emasculate* it, and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain, and highly remedial. It practically covers the field of Federal jurisdiction and is in every respect a model law. *To destroy or undermine it at the present juncture, when combinations are on the increase and appear to be as oblivious as ever of the rights of the public, would be a calamity.*"

I beg to submit that there is no escape from the logic of the language used. A light that would lead one to ignore the arguments, submitted by Senator Nelson and quoted with approval by Justice Harlan, is not the light of reason. A rule that will divide crimes into reasonable crimes and unreasonable ones is not a rule of reason, no matter how many judges may concur in its enunciation. The Anti-trust law as recently construed by the Court is no longer a criminal law, and as a civil statute it is badly crippled. No wonder the corporations that are now being prosecuted under the law have immediately enlarged their defense so as to deny the unreasonableness of the restraint of trade which they are attempting. The Court has multiplied the difficulties under which the Government prosecutors will labor, even when they commence civil prosecutions, but can the Government hope to convict trust magnates of crime under the law as now constructed? In crime the intent is everything, and the accused is entitled to the benefit of every reasonable doubt. What trust magnate could be convicted of criminal intent (with every reasonable doubt resolved in his favor) to *unreasonably* restrain trade when there is no legal definition of unreasonable restraint? Justice Brewer, speaking for the Court in Tozer *vs.* the United States, 52 Fed., 917, said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Company *vs.* Dey (35 Rep., 866, 876) I had occasion to discuss this matter, and I quote therefrom as follows: 'Now, the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal, and punishable by fine, and that such a statute is too indefinite

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and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable rate.' If this were the construction to be placed on this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In the light of this decision, who is likely to be convicted of a criminal violation of the Anti-trust law? We may as well recognize that *we now have no criminal law against the trusts.* Whatever is left of the Anti-trust law — the only protection against monopolies for twenty-one years—must be enforced as a civil statute, and of what value is that when it requires four and a half years to reach a decision which, when reached, is of but little value when applied to another case? According to the decision of the Court, each case must now be decided upon the facts which it presents, the reasonableness of the restraint being a mere matter of opinion, and, as the value of testimony depends as much upon the manner of the witness as upon what he says, the court deciding upon a printed record may reach a very different conclusion from that reached by a court or jury having living witnesses before it.

If one would understand the effect of the Court's decision on the Anti-trust law, let him apply it to other criminal statutes with which he is more familiar. What would the statute against larceny amount to if it only prohibited " unreasonable " stealing? Or the statute against burglary if it did not prohibit burglary except when carried beyond a " reasonable " extent? What protection would there be in a law against assault and battery if it prohibited only " undue " beating? The average man will regard the report of the Senate Judiciary Committee above referred to as a much more reasonable document than the decision of the Supreme Court, and the opinion of the average man as to what should constitute a crime is an opinion that must be taken into consideration even by the Supreme Court, for in the United States the opinion of the average man sooner or later becomes the law of the land and the controlling force in government.

Seventh: And what shall we say of the Court's action in allowing six months for reorganization? If the defendants have been guilty of violating the law for twenty years, why should they be allowed six months in which to continue to

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violate the law while they perfect a new combination? In the Tobacco case Justice Harlan protests with feeling against the time given to the defendants, who are, by the decision, declared to be open and notorious violators of the law. He says, "I find nothing in this record from beginning to end that makes me at all anxious to perpetuate any combination among these companies."

Is it not a little strange that such consideration should be shown to men whose crimes are so enormous? If men of less wealth were involved, would the Court hesitate to enforce the law immediately? If the defendants have violated the law—and they could only be convicted upon the theory that they had violated the law—can the Court suspend the law as to them or grant them immunity in advance for future violation during a given period? Nothing can do more to encourage anarchy—no better material for anarchistic speeches can be furnished—than judicial decisions that deal leniently with great offenders. Equality before the law is not the doctrine of the demagogue. Those who believe in it are not disturbers of the peace, nor are they attempting to array class against class. Equality before the law is a fundamental doctrine of free government, and it cannot be disregarded with impunity by any court, however high. It is of the utmost importance that our courts shall deal with the great criminals as they deal with small ones; a man who steals a pocketbook is a violator of the law and deserves punishment, but he is no more a violator of the law than one who conspires against ninety millions of people. To visit swift condemnation upon the poor and friendless and to grant indulgence to the rich and powerful shocks the sense of justice which God has planted in every heart—that sense of justice which is the only foundation of free institutions.

Eighth: The last question to be considered is, what is to be the result of this decision? We have seen one result—namely, rejoicing on the part of every man pecuniarily interested in the corporations which are exploiting the public. But what will be the effect upon the public? This question cannot be answered without entering the realm of prophecy, and prophecy is uncertain. We have seen one decision of the Supreme Court—the decision in the Dred Scott case—hasten a civil war, and we have seen another decision—the decision in the Income Tax case—compel the submission of an amendment to the Constitution. We shall see, as times goes on,

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whether the people will acquiesce in this decision or be aroused by it to more energetic action against combinations in restraint of trade, and the result will have its effect upon the reputations of the members of the Court. If the revolution which Chief-Justice White has led marks the beginning of a permanent policy he will be accorded a high place among our jurists. If, on the other hand, public sentiment develops along the line of the dissenting opinion we may expect to see Justice Harlan increasingly honored. If his warning is heeded and the people assert their right to protect themselves against trusts and monopolies he will become the forerunner of a great reform, while the flame which the Court mistook for " the light of reason " will be discarded as an illusion.

WILLIAM J. BRYAN.

THE EFFECT

BY JOHN LARKIN

WHEN the people of the country returned to peaceful pursuits after the Civil War competition was unrestrained, unreckoning, and lawless. To secure increased trade or following from the wreck of a business rival was the object of corporation and individual. Victory by such method was always at great loss and frequently barren and destructive to the victor. If unrestrained and unlimited competition be the panacea for economic ills, that medicine was tried and found ineffective.

Such victory was hardly worth while, and the orgy of reckless competition was followed by the broader view that limits should be set to acts of competition, that reasonable fairness should exist even in the warfare of business, that territories might be allotted for development, that working agreements might be made in the nature of a truce from time to time, and that co-operation might even take the place of competition. Combination of former rivals and competitors followed, by which available capital was increased, waste reduced, and alert minds were permitted to concentrate upon developing new channels for business enterprise rather than upon new methods to destroy their competitors. Success followed these methods; stockholders received fair returns upon their investments; further capital was easily found to develop the untouched resources and territory of the country; great railroad systems were built

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up from insignificant units with beneficial results to the public in the way of better service and greater convenience. The idea of combination and co-operation of business was seized upon by great minds and applied in a large way. The combinations thus developed became giants in power.

The immediate result of these great organizations was beneficial to the public. Freight and transportation rates became lower and industries products as a whole cheaper. Nevertheless, many thoughtful citizens viewed these great aggregations of capital and energy with misgiving: they were becoming too powerful; they were in business, in politics; they were in the Legislatures; they were here, there, and everywhere, and they never slept. They were to be feared; they were secretive; they moved in strange ways; they could not be seen nor talked to and they never talked back. The idea spread with amazing rapidity and virulence. All such combinations were declared bad. Congressional and legislative investigations followed of the methods used by some, and all were found guilty of high-handed and lawless acts in the development of their enterprises. Something should be done to shear them of their too great and threatening power.

So in July, 1890, the Sherman Anti-trust Act became a law of the United States. Congress enacted in the first clause of that act that " every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce amongst the several States or with foreign nations is hereby declared to be illegal." Sweeping words, but what did they mean? What was meant by " restraint of trade "? The statute did not define the words and their meaning had to be sought in decisions by the courts. In those decisions the words " restraint of trade " had a well-understood and definite sense.

Economic conditions repeat themselves, and the efforts to correct economic troubles are numerous and of record. As trade and commerce are the life-blood of a peaceful people, anything which interferes with its proper circulation must result disastrously; the energy of a people must have proper channels for expression, otherwise less innocent ways will be found for its outlet; anything which restrains trade and commerce should be rebuked and made void for the public good. This is the argument against restraint of trade. What does restraint of trade mean as defined by the courts

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almost from time immemorial? The typical case was where one was engaged in a trade or calling and made a contract no longer to do so; such contract was declared to be contrary to public policy and void; he was guilty of restraining trade. If several joined in the same agreement it was a conspiracy affecting the public good and could be dealt with criminally; it was considered the duty of a citizen to work at his trade or calling and not to become a public charge; he owed this duty to himself and his family and in a larger sense to his country. Now the trusts had not been restraining trade in that sense; possibly they had made contracts here and there which were, or could be construed as, in such restraint; but such contracts were incidental, unimportant relatively, and the misgiving about the corporations were not due to them. Far from restraining trade in any such sense, the corporations were, on the contrary, diligently, if sometimes ruthlessly, *extending* their trade far and wide at home and abroad, in season and out of season, with tireless industry; they were adding to the wealth of the country by the creation of products purchased by consumers throughout the world; their competition was felt by those engaged in the same field of work, and their energy affected adversely the trade of their competitors. But otherwise they neither actually nor technically restrained trade. Moreover, the first clause of the act assumes the legality of trusts and combinations; they were not declared to be unlawful, nor were they prohibited from engaging in interstate commerce. Nor does this clause of the act say anything about competition or directly or indirectly forbid contracts in restraint of competition; the words used are "contracts in restraint of trade." There is nothing in the act to prevent contracts not to compete nor to enter into competition for trade and commerce. So the first clause of the statute forbids something that the corporations had not been doing and does not forbid what they had been doing in competing.

The second section provides that every person "who shall monopolize or attempt to monopolize," or "combine or conspire with any other person or persons to monopolize, *any part* of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor." Thus we are confronted by the first section, which declares any contract limiting trade is illegal, and by the second, which makes an undue increase of trade a misdemeanor.

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This juxtaposition of the sections does not make the meaning of the act any clearer.

The statute does not define monopoly, and reference must be made to history for the meaning of this word. Examination shows that a monopoly could only arise from a grant by a sovereign power to a person or special group of persons to do something which before had been enjoyed in common. There is nothing of that character here. The combinations, trusts, corporations, or whatever they may be called had no grant of a monopoly or exclusive right to do anything. The monopoly charged against them is that they did more business in their special line than any other of their competitors. This privilege was inherent in every individual and in every corporation. The words of the statute cannot, therefore, be read literally. No condition existed to which the statute could refer if the words were taken literally and in their accepted meaning, for what had been done by these combinations or trusts any citizen or group of citizens could have done. There was no grant or special privilege conferred by the sovereign power upon any particular man or group of men of greater rights than were already inherent in any and every citizen of a State.

Whatever else these combinations did as a matter of everyday knowledge, they did not restrain from trading, nor did they refuse to engage in trade or commerce; nor did they conspire with any one not to develop their trade or commerce. If there was any conspiracy it was to advance their trade and business by every possible method.

The statute, in brief, says that no person shall attempt to restrain interstate trade nor shall he attempt to monopolize any part of it, under penalty of fine and imprisonment. By necessity any railroad becomes a partial monopolizer of commerce when it lays its tracks in a certain territory. An industrial enterprise becomes a partial monopolizer when it establishes its factory to supply a given territory.

To give effect to this statute so that the public will might be enforced and yet without violating fixed principles of construction and the plain meaning of words was the problem which confronted the Supreme Court.

If it was a difficult problem for those interested in the business in this country to decide what could and what could not be done, the problem the legislative branch of the Gov-

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ernment presented to the Supreme Court of the United States was much greater.

As a literal and technical reading of the statute made its application anything but clear, the Court was compelled, in order to ascertain the intent and object of the act, to go out of the act to learn what the economic conditions were at the time of its passage. The conditions which Congress had in mind were disclosed by the debates which were had while the act was in passage. From these debates it appears that the indignation of the public had been aroused by the treacherous, underhanded, and vicious acts which some of the combinations had resorted to for the purpose of absorbing the business or territory of a rival for the purpose of extending its own. The evil which the act sought to remedy was lawless competition, unfair, and unjust. Whatever the intention of the Legislature may have been, that intention, either by accident or design, was not expressed. Although the evils sought to be corrected were those arising from lawless competition, yet that word, the word competition, does not appear in any part of the act. Yet judgment was rendered against the defendants in the earliest of the trust cases and by the Supreme Court upon the very ground that competition was restrained by the agreement made; and competition being restrained, it followed as a consequence that business or trade was restrained and therefore there was a violation of the law.

There are no qualifying words such as "contrary to public policy," "against the public good," or "unreasonable," or "unlawful" in the Anti-trust Act. The words of the act were unqualified. Every contract in restraint of interstate trade was illegal. Every person attempting to monopolize any part of interstate trade was guilty of a misdemeanor. Pushed to the extreme, this meant that every corporation or individual which should acquire another business of an interstate character would to that extent be attempting to monopolize that part of interstate trade which would make the contract of purchase illegal and those interested, criminals. The relation of the business so acquired, as compared with the whole business of that character, had nothing to do with the question. It tended to create a monopoly when one corporation or individual decided to extend or enlarge his or its scope of its business.

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If the corporation acquired the assets of the other, or its stock, it restrained trade to the extent that it rendered that particular corporation unable to continue in business, although the effect on the public was obviously the same if the two methods of transportation remained as formerly and at no greater expense. The Court thereupon, in the Trans-Missouri Freight case, decided in March, 1897, said in its opinion that literal interpretation would have to be given the act regardless of consequence; whether the public were benefited by the merger or contract or agreement was not the test because the power existed in the combination to affect the public injuriously, and that was sufficient whether the injury was actually worked or not. That the combination might be distinctly to the public good was immaterial if the allied companies had the power later to impose their policies upon the public to its disadvantage. And as the railroads agreed among themselves upon the rates to be charged they restrained competition, and restraining competition they restrained trade as a sequence.

The result, therefore, seemed to be a paradox, for Congress intended (as appears from the debates, although it did not by the act say so) to restrict competition within lawful bounds, while the Supreme Court said that any acts, whether beneficial or otherwise, which restricted competition were, under the act, illegal. The claim that the statute should be reasonably construed was repeated in many subsequent cases, but the Court steadfastly refused to read into the act any qualifying words whatever and adhered to its first interpretation. Then the business men of the country found that the decision might apply to them as well as to the giant combinations and commenced to interpret the Anti-trust Act for themselves. They say by the act that trusts, combinations, corporations, and mergers were not prohibited. They had learned that their success in business depended upon progressive activity, rather than by maintaining an impossible stationary condition compelled by the act as interpreted, the only way a corporation could keep itself immune from the penalties of the act. They also persuaded themselves that as their business was comparatively small as compared with the whole business of that character engaged in interstate commerce, they would not be affected, and that the law was not meant for them, but for others higher up in the business world.

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The result of all of which was that the law, general in its terms and applying to all within the literal meaning of its terms, was construed by those engaged in interstate business (practically every business of any consequence) in a very practical manner as differentiating between good and bad corporate activity; between enterprises and plans which were generally good or generally bad, and between great combinations as against those of moderate size. As these points were settled in the minds of the business men of the country they continued to engage in business, satisfied that the construction then made by them was correct and that it was a good working business law. Meanwhile other cases proceeded to the Supreme Court, where were repeated the arguments that the question of public interest should be the fundamental point upon which each case should be decided; that the act should be held to be a declaration of the existing common law; whether the restraint of trade complained of was reasonable and necessary or whether it was unreasonable and vicious should be the real test.

In the cases lately decided many facts were shown which warranted the finding that unfair competition had been resorted to; that outrageous, illegal, and high-handed methods had been used to crush out competitors and absorb their former fields of endeavor. Assuming all of this to be so, the business of the country generally should not be made to suffer because some merchants have succumbed to a more intelligent business campaign or to an unlawful demolition of their trade. The remedy for the first does not exist in law, and in the second case an award for damages sustained may be had for the asking.

Again, the people of the country appreciated that unless their construction was given to the statute it would be left for the United States District Attorney to decide which business should be shut down and which should be permitted to proceed. This would depend on the character of the prosecuting attorney, his likes and dislikes. The country had never granted any such power to any prosecuting officer. In former days a judge or jury or both decided whether an illegal or criminal act had been committed, and this depended upon the acts done in pursuance of the agreement and not upon the agreement unsupplemented by overt acts.

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It would be as easy to ask the sea to be still as to ask the energy and property behind the business of the country to accept in peace a reiteration of the doctrine enunciated in the Trans-Missouri case.

The inexorable logic of the decision in the Trans-Missouri Freight case was recognized by the business interests of the country and appreciated until they believed it might also apply to them. They knew so far as they were concerned that they were not injuring the public, although they believed that some other but greater combination might.

This same common-sense conclusion had also been reached by a former Chief Executive of the country who differentiated trusts or combinations as being good or bad, as beneficial or baleful, and selected for attack such as he believed to be in the latter class.

Constrained by public opinion and by the ultimate destruction of business generally if the doctrine in the freight cases were adhered to, the Supreme Court modified the construction formerly placed upon the act and declared that the " rule of reason " should be applied to it, which is the same as saying that the rule of common sense should apply. As a result the law becomes general in its application and applies to every business enterprise engaged in interstate commerce the test whether such enterprise is good or bad from the standpoint of the public good.

This construction, appealing to every one as just and fair and far-reaching, should satisfy all.

It should satisfy the great corporation or trust because it should be prepared at all times to stand or fall upon the question whether or not its activities are beneficial or hostile to the public welfare.

It should satisfy the smaller combination because its business, comparatively negligible, may not be the subject of attack by an overzealous public prosecutor.

It should satisfy every citizen because the object of the act has been attained. Danger to the country comes only with corporations of giant size whose power and wealth when combined with others make them no mean rival to the power of the country. To restrain such power and keep it within bounds was the real purpose of the Anti-trust Act.

The phraseology of the act was but a means to this end and this end has now been brought to pass.

JOHN LARKIN.

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THE RECORD

BY FREDERIC R. COUDERT

"The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head, and reconcile the jarring opinions."

THESE are not the words of the Chief Justice of the United States in the Standard Oil case, however appropriately they might have been there used, but are taken from the opinion of Chief Judge Parker (later Lord Macclesfield) delivering the opinion of the Court of Kings Bench in a case involving a contract alleged to be "in restraint of trade" in the year 1711 (Mitchel *v.* Reynolds, 1, P. Williams). It thus would appear that for some two centuries the subject has not been free from difficulties and that jarring notes at Bench and Bar are merely healthy exuberances of free institutions in a progressive civilization.

Perhaps since Chief-Justice Taney announced the decision in the case of Dred Scott, no judgment of the Supreme Court has evoked wider interest, suscitated more controversy, and elicited greater divergence of views than that in the case of the United States *v.* the Standard Oil Company. Yet this case differs from the great epoch-making decisions of the Supreme Court of the United States, such as Marbury *v.* Madison, McCullough *v.* Maryland, the Dred Scott case itself, the Income Tax case, and the recent Insular cases, in that here no question of our Organic Law is involved. The Supreme Court was not required to pass upon any great question of constitutional or public law in pursuance of that peculiar power conferred upon it by the Constitution and which is exercised by no other supreme tribunal of any of the great nations.

The decision of the Court in the present case was in the exercise of one of the most elemental, indispensable functions of the judiciary—viz., the interpretation of statutes. In the terse and elegant English of Mr. Justice Holmes in the Northern Securities case:

"Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt." (193 U. S., p. 401.)

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Human ingenuity has as yet failed to draught a law of such precision and clarity that no man can be found who is not willing to draw its interpretation into question. This calls to mind the classic illustration of the leech who was prosecuted for having bled a patient in the town of Bologna, the law decreeing that " whoever drew blood in the streets should be punished with the utmost severity." The prosecution in that case evidently believed in the strict construction of the law, but even at that ancient date the more liberal view prevailed and the case was held not to be within the intention of the lawmaker. It has been well said that the pole star of judicial construction must be the intention of the Legislature, however difficult this may be to ascertain. It is well put by Mr. Justice Swayne (23 Wall, 374-380):

" A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

That quaint old law-writer, Plowden, cites a case holding that a statute of Edward II enacting that a prisoner " who breaks jail shall be guilty of felony " does not extend to a prisoner who breaks out when the prison is on fire, " for he is not to be hanged because he would not stay to be burned."

But in ascertaining the intent of the lawmaker and the object or purpose of a statute not only the contemporaneous situation, but the historic past, will be examined to shed light upon that intention, where ambiguity or obscurity exists. A government in which there is no organ having power to determine questions arising under those general rules of human conduct which we call laws would be necessarily anarchic. This is so generally recognized that the great French Civil Code (Code Napoléon) prescribes that no judge shall refuse to interpret a statute because of its obscurity or ambiguity.

The wide-spread interest in this case is due to the fact that the question with which the statute deals — " monopoly "—has become the main political and economic problem of the day. The development of business in the United States necessarily requires that there shall be some legal rule by which the validity and legality of the large aggregations of capital shall be determined.

" Monopoly " is no new thing, nor is the dread which it at present seems to inspire peculiar to our people, for we find

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that in A.D. 483 Emperor Zeno issued an edict as follows:

"We command that no one may presume to exercise a 'monopoly' of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, and if any one shall presume to practise a 'monopoly,' let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay fifty pounds of gold."

And to come down to more recent times we find that the Court of King's Bench in 1711 declared that:

"Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible."

The English and American law reports contain many cases on *combinations* and *monopolies* at the common law and all of our States have some statutory enactments on the subject, many of them of very recent date and of drastic tenor.

In 1889 the attention of Congress was called to the need for a Federal law prohibiting monopolies, and the evils of the so-called trusts were debated and denounced in considering the bill introduced by Senator Sherman, which in somewhat amended form became the famous Sherman Anti-trust Law.

The necessity for such a law, if the Federal Government intended to take any part in prohibiting monopolies, was manifest, since the Federal Courts have no common-law jurisdiction, but derive their powers from the Constitution and Congressional statutes. This must be remembered when the question arises as to whether this act was merely declaratory of the general common-law rule as laid down by the courts of England and America or furnished another and broader one.

The sections of the act setting forth the offenses aimed at are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

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"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The statute further provides for the use of the equitable remedy of injunction. While a Court of Equity has no inherent power to enjoin the commission of a criminal act, such powers may be and sometimes are conferred by statute. This act is thus endowed with a double aspect, civil and criminal. The more important cases in which the Supreme Court has passed upon it have come up by way of suit for injunctive relief against the alleged monopoly or combination, and the criminal features have been only incidentally considered.

While, technically speaking, debates may not be used as a means for interpreting a statute, yet, as the Chief Justice remarks in the present case:

"That rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of a period when it was adopted." (Op. p. 15.)

An examination of the debates makes it perfectly clear that Congress had in mind the great combinations in the necessaries of life which at that time were already exciting serious attention throughout the country. Senator Sherman evidently thought that his bill did nothing more than enact the common law which he believed amply sufficient to carry out the intention of Congress as to the restricting of monopolies. Speaking of his first draught of the bill, he says:

"It sets out in most specific language the rule of the common law which prevails in England and this country, especially declared by the Supreme Court of the State of New York in a very clear and able opinion, which I have here on my desk." (Bills and Debates in Congress relating to Trusts; Government Printing House, p. 15.)

It will be necessary to discuss further on the much-mooted point as to whether the Sherman law was declaratory, as this has been the question about which continuous controversy has raged since the passage of the act down to the time of the Standard Oil decision, which seems to have finally resolved that problem. At present it is sufficient to say that the combinations and monopolies which Congress

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had in mind were, generally speaking, not difficult of ascertainment; they evidently were the great companies which had been denounced by political orators and political platforms for some time past, and it was so stated time after time in the debates.

Before discussing the merits of the Standard Oil decision I will set forth briefly what the case decided and analyze the decision, which shows that:

(1) The interpretation of the Court gives full effect to the intent of Congress, which intent must be read (a) in the light of the common law and (b) in that of contemporary history, and

(2) The controversy regarding the question as to whether or not the Court has injected the word "reasonableness" into the statute is a mere word battle or logomachy due to a misconception of the decisions that have gone before and the true meaning of the utterances of the Chief Justice, in the Standard Oil and Tobacco cases.

The bill of the United States against the Standard Oil Company, covering some hundred and seventy pages, sets forth the history of that organization and emphasizes the three phases through which it had passed. These phases were (1) the combination between individual firms prior to 1870 into a corporation known as the Standard Company of Ohio. This combination existed from 1872 or thereabouts to 1882, at which time, as the Court found, the defendants then (2) entered into one of those agreements which had come to be known technically as a "trust," by which the stock or interests in various concerns were transferred in trust to one company which acted for all. This arrangement was condemned by the Supreme Court of Ohio in a suit to dissolve the trust and thereafter (1889), (3), the company entered into its present status—viz., the operation of many subsidiary companies through the Standard Oil Company of New Jersey, a holding corporation, which had obtained and acquired a majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and thereby managed and controlled the same. It was this last phase which was charged as being peculiarly within the act, the earlier history of the company, especially that prior to the passage of the Sherman Law being adduced simply as evidence of a continued and definite purpose, extending over some forty years, to drive out competitors and to monopolize

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the oil industry for the benefit of the small group of magnates who dominated it.

The Court holds that the two sections of the statute, that relating to "restraint of trade" and that relating to "an attempt at monopolization," must be read together and that both had been violated by the acts of the defendants. The decision of the Circuit Court, holding as an illegal restraint of trade and monopoly the combination formed by these numerous defendants and operating through the Standard Oil Company of New Jersey, was affirmed by the Supreme Court upon the following grounds, which the Chief Justice tersely sums up as follows:

"(a) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

"(b) Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it" (pp. 31, 32 Op.).

This result is concurred in by all the members of the Court, and if the decision had been placed shortly upon the ground that the monopoly created by the acts so adverted to were within the statute the case would have evidently caused comparatively little discussion.

The decision is, however, of a more broad and general importance, because:

(1) It explains, and it is claimed limits, the general language of the statute so as to remove from its operation

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many cases which the literal terms of the law would indicate as falling within it;

(2) It is claimed to be in contradiction with rules theretofore laid down and fully established in prior decisions during the past fifteen years.

This view is emphasized and dignified by its statement with great earnestness in the opinion of the Senior Justice of the Court, Mr. Justice Harlan, who, while concurring in the conclusion reached, dissents from the reasoning of the Court. So impressed is this venerable and universally honored jurist with the reasoning of his brethren of the Court that he feels himself bound "to say that what the Court has said may well cause some alarm for the integrity of our institutions" and continues:

"I said at the outset that the action of the Court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the Court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This Court, let me repeat, solemnly adjudged many years ago that it could not, except by 'judicial legislation,' read words into the Anti-trust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the Act as passed, if properly interpreted, would not justify. The Court has decided that it could not thus change a public policy formulated and declared by Congress, that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. . . .

"Nevertheless, if I do not misapprehend its opinion, the Court has now read into the act of Congress, words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done *without violating the Constitution—namely, by interpretation of a statute* changed a public policy declared by the legislative department. . . .

"To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all." (Op. Justice Harlan, as printed in New York *Times* of May 26th, 1911.)

The elaborate opinion of Chief-Justice White is evidently designed to show that the course of decisions heretofore has been uniform and that whatever isolated expressions may be found as to the interpretation to be put upon the statutes the results reached in each case have adequately effected the intent of Congress.

The difficulty confronting the Chief Justice arose from the interpretation to be given the words "in restraint of trade." This language of the statute came before the Su-

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preme Court for the first time in the now famous case of the United States *v.* the Freight Association, 166 U. S., 290. That case involved a combination of railroad companies which had entered into an agreement fixing freight rates. The Government attacked this combination on the ground that it was in restraint of trade. Mr. James C. Carter, with his extraordinary erudition and ingenuity, defended the combination on two grounds: first, that the Sherman Act did not apply to railroad companies, as these companies were subject to regulation by act of Congress in a manner that did not apply to ordinary private companies and that as public utilities they were not within the fair intendment of the act, since the right which the State had to fix rates was inconsistent with the idea of a monopoly menacing to the public weal; and, second, that the record showed the rates to have been reasonable and proper and that, under the doctrine of the common law, of which the Sherman Act was merely declaratory, a contract which reasonably restrained trade was not involved. The first question was the one mainly discussed and the Court found that the act was applicable to railroads. Incidentally I may say that our courts take what certainly seems, at least from an economic standpoint, the sounder view and exclude public utilities from the general category of monopolies and restraints on trade. (Matter of Attorney-General *v.* Consolidated Gas Company, 124 App. Div., 401.)

The Court further held that they were unwilling to consider whether the rates in question were in themselves reasonable, since the terms of the statute were absolute and categoric and forbade all restraints of trade, whether reasonable or not.

"By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." (United States *v.* Freight Association, 166 U. S., p. 328.)

This utterance of the Court was unnecessary to the de-

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cision of the case and was what is termed by lawyers an *obiter dictum* or remark or argument not logically necessary for sustaining the conclusion or judgment reached, since the agreement would certainly have been invalid under the common-law rule. I am convinced that it is this dictum in the opinion of Mr. Justice Peckham, writing for the majority of the Court, which has led to the futile and academic discussion as to the rule of "reasonableness." The opinion in the Freight Association case in my view misapprehends the real scope of the common law. The common law, about which so much has been said, is not really difficult of ascertainment; its general propositions regarding this class of cases are clear enough, however difficult of concrete application.

There were three categories of illegal agreements restraining trade known to the common law:

(1) Contracts in restraint of trade;

(2) Combinations or conspiracies in restraint of trade; and

(3) Monopolies.

1. Contracts in restraint of trade had a fixed and definite meaning and go back to the time of the Year Books of the fourteenth century. Such a contract was one by which a person selling his business or trade contracted that he would not further carry on such business. The object of the contract was to protect the vendee against the competition of his vendor, which might easily have made his purchase valueless. In the earliest times any such contract was held invalid, because the man who contracted not to carry on his trade was abridging his freedom and was liable to become a public charge. Gradually, however, these agreements came to be recognized as valid within certain limitations. Where it was evident that the object of the agreement was merely to assure the vendee the possession of the good-will of his business and where the limitation was not such as to indicate that the primary object of the agreement was to monopolize the trade, but was merely a reasonable accompaniment of a contract of sale, it was held valid. The general rule consequently came to be that a partial restraint of trade would be valid while a general restraint was not. For instance, a baker selling his shop might validly contract that he would not carry on his trade in London, but he could not agree that he would not carry it on in England, as this would have been

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unnecessary to the protection of the vendee and hence unreasonable and oppressive, indicating the primary purpose of the agreement to be the creation of a monopoly rather than the protection of a business good-will.

With the changes in transportation and industry the question of partial or general restraint of trade lost much of its significance, and the query was whether the contract of restraint was "reasonable" or "unreasonable." This category of reasonableness at the common law is not vague and subjective, but is extremely concrete and clear. It was a question for the court and jury in each case to decide upon the facts as to whether the contract in restraint of trade was merely collateral or ancillary to the contract of sale. If so, such indirect or partial restraint of trade was considered as a reasonable exercise of the right of free contract. When, on the other hand, it appeared that such a contract had for its main object restraint of trade or practical monopoly, then, however the agreement might be phrased, the Court would hold it an unreasonable exercise of the liberty of contract and void as directly restraining trade.

2. I am convinced that the Court in the Freight Association case confused this very distinct class of contracts in restraint of trade with a very different legal category—namely, *combinations in restraint of trade.* By this term the common law indicated an agreement among various persons maintaining separate business establishments to fix or in some way regulate the prices or the output of the various establishments. Such contracts have been always and at all times contrary to the policy of the common law and to them no criterion of reasonableness was applicable. (See Justice Holmes's dissent, 193 U. S., 400.)

Agreements having for their object a direct restraint of trade, by interfering with the rights of each of the parties thereto to sell at what price he pleased or restricting the output, necessarily fell within the inhibition of the law and were invalid. The rule is very clearly stated in an opinion of the Court of Appeals of New York (People *v.* Sheldon, 139 N. Y., 251). This case dealt with a combination between dealers of coal in the city of Lockport to fix the rate at which coal should be sold. The members of the agreement were indicted under the section of the Penal Code making it a misdemeanor to commit "any act injurious to trade or commerce." The same argument was used in defense of the

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combination as in the Trans-Missouri case, that the rates were *fair and reasonable*. The Court evidently did not consider that there was any difference between the meaning of the statute and the general rule of common law, and dismissed the argument as to the reasonableness of rates by saying:

"But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation. . . .

"The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used. . . .

"The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. . . .

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character" (pp. 263-265).

Still more recently the common-law doctrine has been lucidly expounded by the New York Court of Appeals in a suit brought on an agreement between producers of Hudson River blue stone, who controlled nearly ninety per cent. of the amount sold in New York. It was urged that the jury should be allowed to pass upon the reasonableness of the prices, but the Court held the question immaterial in this class of cases and differentiated them from those contracts which involved the withdrawal of a vendor from business and in which the restraint was incidental to a sale rather than constituting the primary purpose of the agreement.

The Court said:

"It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. *The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity.* They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

"The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts do anything to injure what he sells. . . . It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he

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can sell, or finds it to his interest to abandon, much less to continue it for any time or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations; all are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void." (Cummings *v.* Union Blue Stone Co., 164 N. Y., pp. 404, 405.)

The emphasis placed upon the words " reasonable " and " the light of reason " by the Court in the Standard Oil case was perhaps unfortunate. It is quite probable that for the words " reasonable " and " unreasonable " with regard to restraints of trade the words " direct " and " indirect " restraints could be advantageously substituted. This would put the test of validity in a clearer, less subjective and metaphysical light and distinguish between combinations which have for their primary purpose restraint of trade and those contracts which may incidentally restrain trade, but whose main object is the sale of a business.

The identity between the test of *reason* and that of *directness* is recognized by the Chief Justice in the Standard Oil case, for he says, referring to the rule of reason:

"From this it follows, *since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing,* that the difference between the two is therefore only that which obtains between things which do not differ at all" (Op., pp. 25, 26).

3. The third common-law concept comprised in the statute is that of " monopoly." " Monopoly," strictly speaking, at common law could only arise from a Crown grant and is defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are

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sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade'" (Op., p. 15).

It is quite evident that no such conception of *monopoly* is here involved and that the great combinations of to-day are not "monopolies" in this narrow sense, but are rather capitalistic aggregates whose size and consequent power permit them to effectually prevent any real competition and thus effect those evils which the common law attributes to monopoly.

The purpose, however, of the common law was to preserve, as far as possible, freedom of contract, and it was felt that this was menaced either by a Crown monopoly, combinations in restraint of trade, or unreasonable contracts in restraint of trade. In addition to all these, there were at common law certain peculiar contracts called "engrossing" or "forestalling" which had for their object the obtaining of supplies of the necessaries of life with a view to completely controlling the market. These laws were repealed in the early part of the century, but have an analogy in the anti-option laws found in some of our States.

Had the Supreme Court, therefore, in the Freight case and the Traffic case considered the language of the act in the light of the common-law meaning of the terms there used, they would have had no difficulty in coming to the conclusion that a combination of a number of persons or corporations for the purpose of fixing prices was contrary to the common law as known in England and America. The statement of the Court in those cases that they were bound to take the language of the law literally and condemn all contracts in restraint of trade, whether reasonable or unreasonable, was founded upon an apparent misconception of the common law and a failure to distinguish between "contracts" and "combinations." It is perfectly evident that the Court was right in holding that, however reasonable the rates fixed by the Freight Association may have been, the very fact that the objective of the agreement was the fixing of rates made it illegal *per se*. So broad was the dictum of the Court that:

"By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade" (p. 328).

it became necessary seriously to qualify it in the next case. In fact, Mr. Justice Peckham's opinion in the Freight case

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itself recognizes the distinction between "direct" and "indirect" contracts in restraint of trade, for he says:

"A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, *which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question*" (p. 329).

In the Joint Traffic case practically the same agreement was again brought before the Court and the question reargued by the same counsel; it was insisted that the construction of the Court was such as to interfere with ordinary business and all real freedom of contract, and a number of instances were cited, such as the formation of a corporation to carry on any particular line of business by those previously engaged therein or a contract of partnership between two persons previously in the same line of business, etc., to which the Court replied:

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business." (U. S. *v.* Joint Traffic Assn., 171 U. S., 567, 568.)

And in commenting upon the case of Hopkins *v.* United States, 171 U. S., p. 578, decided at that same term, in which it was held that the statute applies only to those contracts "whose direct and immediate effect is restraint upon interstate commerce," the Court said:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

"*To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this Court.*" (U. S. *v.* Joint Traffic Assn., 171 U. S., p. 568.)

If I have quoted fully from these cases, it is for the pur-

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pose of demonstrating that the Court did not interpret the statute literally as forbidding all contracts or combinations which might incidentally restrain trade. The Court there held, and held rightly, that the criterion of the statute was whether the restraint was a direct or an indirect one. As they refused to construe the statute literally the dictum in the Freight Association case that all contracts fall within its scope is scarcely consistent with the remainder of the opinion, which, when read as a whole, is clear enough.

It is, nevertheless, unfortunate that the Court apparently distinguished between the scope of the common-law rule and that of the statute and misconceived, as I think, the application of the word "reasonable." At common law it would have been no defense to any combination having for its object the fixing of prices to maintain that those prices were reasonable, and the Court in deciding this defense to have been unsound did not go beyond the common law. The expressions referred to in Mr. Justice Peckham's opinion explain the not unnatural popular misapprehension as to the meaning of the word "reasonable," and the present criticism that the Court has at this late date, after fifteen years of adjudication, now for the first time read that word into the statute.

Had Senator Sherman's original law stated that "(1) all contracts in unreasonable restraint of trade and (2) all combinations and conspiracies in restraint of trade are illegal and void," it would have declared the common-law rule both accurately and discriminatingly.

It is evident that the simple distinction between "direct" and "indirect" contracts in restraint of trade effects the intention of Congress, which was not to paralyze the industries of the country by (to use Mr. Justice Peckham's language) "a most violent assumption," but was to prevent those agreements whose primary object was restraint.

It has been argued popularly and the point has been raised in various cases that restraint of trade and restraint of competition do not mean the same thing. This point is fanciful rather than real. Restraint of trade, as the history of that term at the common law shows, included any restriction by which any individual or individuals should, by voluntary act or otherwise, be inhibited from carrying on their trade or business in their own way, which is equivalent

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to restraint of competition, and the Courts have uniformly so considered it. There is, however, this truth in the suggestion that there may well be indirect restraints of competition which may not in themselves restrain trade. This, however, is only illustrative of the fact that the distinction between the two classes of contracts and combinations is that between those which restrain directly and those whose restraints are merely indirect and ancillary to some other purpose.

This view is emphasized by the next important case, which is that of the United States *v.* Addyston Pipe and Steel Company, which dealt with a combination of manufacturers for the purpose of dividing the territory in which their product was to be sold. In the Circuit Court of Appeals the opinion was rendered by Judge Taft, who held such an agreement to be a combination in direct restraint of trade and to fall within the statute. He reviewed in very exhaustive fashion the prior cases and delved deep into the common law, finally concluding that a combination among a number of persons engaged in a particular business to stifle or prevent competition and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition is contrary to public policy as found either at the common law or in the statute. In this very case it was urged that the prices at which cast-iron pipe was sold were reasonable, to which Judge Taft answers:

"We do not think the issue an important one because, as already stated, we do not think at common law there is any question of reasonableness open to the Courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices had they chosen to do so." (85 Fed. Rep., p. 293.)

When the case came to the Supreme Court the question mainly considered was whether the agreement so directly affected interstate commerce as to fall within the statute. This being decided in the affirmative, the combination was declared illegal.

The views of Judge Taft are also those of President Taft, since in a recent message he says:

"It has been proposed, however, that the word 'reasonable' should be made a part of the statute and then that it should be left to the Court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, *what is a reasonable monopoly.* I venture to think that this is to put into the hands of the Court a power impossible to exercise on

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any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."

The message has been quoted as in conflict with the views of the Chief Justice, but I do not think there is any real conflict. Of course there could be no "reasonable" monopoly, since, as the Chief Justice points out, the very objective both of the common law and the statute is monopoly. The test of reason merely applies to the question whether the combination or contract aims at or tends to monopoly. The use of the word "direct" and the elimination of such a vague phrase as "the light of reason" would have greatly clarified the situation.

In Swift *v.* United States a combination of beef-packers was equally held invalid, and it was quite clear that the combination would have been invalid at common law.

The famous Northern Securities case involved a different state of affairs, in that a holding corporation was devised for the purpose of controlling both the Great Northern and the Northern Pacific Railway companies. A grave constitutional problem was involved as well as the question whether the creation of a corporation for holding the stock of both companies was a combination within the Sherman Act. The majority of the Court held that, although the modern form which the transaction had taken differed from the combinations theretofore before the Court, it was still in effect a combination, the object of which was to create a monopoly and hence within both sections of the act.

Mr. Justice Brewer, however, in concurring with the majority of five whose votes were necessary to the affirmance of the decree against the railroads, dissented from much that was said in that case. His opinion is interesting in that it again raised the question of reasonableness. Referring to the Freight Association case, while he thinks the decision correct, he yet says:

"Instead of holding that the Anti-trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions

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at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in *direct* restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended." (Northern Securities Co. *v.* U. S., 193 U. S. at p. 361.)

Mr. Justice Brewer, like the present Chief Justice, found some of the language of the Freight Association and Joint Traffic cases so sweeping as to be of a misleading character and felt that the test of reasonableness or directness should have been more explicitly stated. General expressions and opinions are often dangerous, and certainly the expressions used in the Traffic cases have caused a great deal of difficulty and confusion both at the bar and in the world of business. They well illustrate the wisdom of limiting an opinion to the discussion of those matters necessary to a disposition of the case at bar; otherwise they may, to use the happy phrase of Mr. Justice McKenna, "like the exhalations of a marsh, shine to mislead." (De Lima *v.* Bidwell, 182 U. S., p. 205.)

Even after the decision of the Northern Securities cases, the question still remained whether certain large concerns, which, claiming to be the result of natural and normal growth and disclaiming all intention of driving others from the field or of monopolizing any branch of trade, fell within the act. If the act were to be interpreted with the scrupulous literal accuracy evinced by some of Justice Peckham's dicta, it might reasonably have been supposed that every business in the country, which had in any fashion absorbed the trade of its competitors, was obnoxious to the law.

So doubtful did the bar and the bench feel in regard to this statute that the presiding judge of the Circuit Court of Appeals in the case of the United States *v.* American Tobacco Company voiced at least the popular view as to the construction theretofore placed upon the statute by the Supreme Court as follows:

"Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language (every contract, combination, etc.) is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small. As thus construed

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the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. . . . The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express-wagons between villages in two contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not." (164 Fed. Rep., pp. 701, 702.)

Under these circumstances, the result of the Standard Oil case was awaited with tense anxiety, and it was a cause of general gratification that the judgment was unanimous. It appears, however, unfortunate both for the Court and for the nation that Mr. Justice Harlan felt constrained to dissent from the reasoning of his brethren of the Court. As he had concurred with the majority of the Court in the Freight Association case and the Joint Traffic case, it is evident that even he does not read the statute with literal accuracy as applying to all contracts in restraint of trade, for he took no exception to Mr. Justice Peckham's view that contracts which merely incidentally restrained trade were not within the statute.

The Chief Justice certainly endeavored to deduce from the language and history of the statute and from the foregoing cases some rules by which it might be possible, with a reasonable degree of accuracy, to predict what transactions fall within the act. He analyzes with minuteness and care the English law and concludes that the English decisions and statutes were directed against monopolies and those contracts which may be considered to have resulted in some of the injurious consequences ascribed to monopolies. It hence came about that contracts or acts which were considered to have a monopolistic tendency, especially those which were thought to unduly diminish competition and thus to enhance prices (in other words, to monopolize) came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as monopolies generally. It is difficult to abridge or paraphrase his *résumé,* therefore I quote it *in toto:*

"In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results,

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" (a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practise had come to be considered as in restraint of trade in a broad sense.

" (b) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

" (c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided" (Op., p. 21).

These conclusions certainly seem to give full effect to the intention of Congress, which was to confer upon the Federal Courts power to prevent monopoly and the wrongs incident to attempts to monopolize, adding to the common-law invalidity of such agreements the sanctions of criminal law.

It may be regrettable that the Chief Justice uses the terms " unreasonable," " undue," " the light of reason," and " direct " and " indirect " as meaning one and the same thing, thus seeming to create a somewhat vague standard, but the Chief Justice certainly does not mean the " reason " of each individual court or judge nor any philosophic conception of " light of reason." It is generally held that Public Service Corporations cannot have their charges reduced by the Legislature beyond what is reasonable. This criterion

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has not been found impracticable or even very difficult of application. Whether certain State requirements are proper exercise of the police power or interferences with interstate commerce is a matter which depends upon the reasonableness of the regulation, or, in other words, whether the effect upon such commerce is merely incidental or indirect. (Smith *v.* Alabama, 124 U. S., 465.)

From the analysis already made it seems to us that the language of the statute and the results of all the decisions as to the Anti-trust Act bear out the view *that all contracts and combinations which directly tend to restrain trade are unlawful, and that all attempts to monopolize, brought about by whatever methods, whether old or new, are equally within the statute.*

It may, nevertheless, be thought that these criteria are of so general a character as to be of little value in predicting the results in specific cases. This is undoubtedly true, and yet I submit that, under the circumstances, the Court could not have dealt with the statute in any other way. It has been urged that it would be probably illegal and certainly immoral to indict any one for having unreasonably restrained trade, since the criminal law should be sufficiently certain to give persons some definite notice as to what constitutes its infringement. While this argument has seeming force, many statutes are equally and perhaps unavoidably as vague. One is forbidden, under severe penalty, from driving negligently along the highway, and it is for the judge to charge the jury what constitutes negligence. So it must, under this statute, be for the judge to charge the jury as to what constitutes combinations in restraint of trade or an attempt to monopolize. A monopoly in the modern sense is a capitalistic monopoly and may be no more than a great aggregate of wealth concentrated under one control which renders in actual practise all real attempts at competition ineffective.

The decision in the case of the United States *v.* American Tobacco Company just decided but reaffirms and reiterates the doctrine enunciated in the Standard Oil case and applies it to a more complex and difficult situation. The Chief Justice in that opinion explains the necessity of a fair and liberal construction of the statute, one which will carry out the intent of Congress to check monopolies while not interfering with those ordinary and normal contracts which it

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was the object of the statute to protect. The view of the Chief Justice may be summed up by saying that a liberal construction of the statute alone will make it really effective, and as so construed it must be declaratory of the common-law rule which had in view the same purpose as the act—namely, the protection of freedom of contract against impairment by monopolies. A narrow, literal construction would thus not only be anti-historic, but wholly nugatory of the intent of Congress, in that it would paralyze that ordinary and natural trade development whose main purpose it was to safeguard. The Chief Justice thus appositely puts it:

"The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us." (Op. American Tobacco case, p. 27.)

The remedies applied by the Court in the Tobacco case seem peculiarly appropriate to the elimination of monopolistic features, while not of so drastic and merely destructive a nature as to disastrously affect the interests of the public and of innocent stockholders.

It is probable that in future the criminal feature of the law will be more largely relied upon by the Government as a deterrent to monopoly. In this event the question of intent will evidently be of very great importance. The general legal doctrine is that there is no crime without intent, but this is only a rule of construction which may be negatived by the Legislature. There is a class of cases in which the courts have held that the plain language of statutes made immaterial the question of intent. In such cases the fact that the persons charged have violated the express prohibition of the law is sufficient ground for conviction. A typical case of this kind is one arising under the statute of New York preventing the sale of impure or adulterated milk. While it was admitted that adulterated milk had been sold, proof was offered that this was without the knowledge, and therefore the intent, of the defendant, to which the Court of Appeals answers:

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"As the law stands, knowledge or intention forms no element of the offense. The act, alone, irrespective of its motive, constitutes the crime. . . . Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose." People *v.* Kibler, 106 N. Y., pp. 323, 324.)

While it still is open to question as to whether the Sherman Law is in the same category, yet, where a monopoly has been actually created, it will probably be well-nigh impossible for defendants to escape upon the ground of lack of intent. Persons are always presumed to have intended the natural effect of their acts, and the doctrine of intent even where applied, especially in cases of purely statutory delinquencies, has been beaten out very thin.

There may be and probably are sound objections to the statute on economic grounds, but I do not believe that it can be successfully challenged upon the ground of vagueness or uncertainty. It has always been a difficult question to draw the line between "direct" and "indirect" contracts and combinations restraining trade. The difficulty is more acutely and generally pressing to-day because of the approach to actual monopoly in so many of the necessaries of life.

I cannot think that Mr. Justice Harlan is justified in considering the present decision as really at variance with former decisions. Taking these decisions together as a coherent whole, there can be little or no doubt that the result reached in every one was similar to that which would have been reached upon the assumption that the statute was merely declaratory of the common law. It must seem deplorable that so much confusion should have arisen over what now seems to have been a battle of words.

There is necessarily a continuing conflict in society between justice and certainty. That in the law there should be some degree of certainty is necessary to every-day life and the transaction of business, but absolute certainty in the law is only possible in a society whose stability is as great as that of the ancient Medes and Persians; changing social and economic conditions give rise to different situations and to opinions which must ultimately find their way into the law. The warfare against modern monopoly is being carried on with the rusty weapons of medieval England, and any confusing economic result should not be attributed to our

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courts. No other result is to be hoped for while legislators, instead of giving these great problems intelligent, constructive consideration, weighing the economic advantage of unified and concentrated production against the social evils which may arise from suppressing great numbers of small producers, content themselves with redeclaring the ancient doctrines, which, if they were ever adequate to cope with the problem, seem completely and wholly ineffective as a solution of the economic problems confronting us at the present time.

The Sherman Law, if construed absolutely and literally, according to the most approved Chinese method, would result in complete economic stagnation. Interpreted rationally in the sense intended by its originator, as declaratory of well-settled rules of common law, it will not annihilate business nor even perhaps very seriously impair its development. It is, however, calculated to leave the whole question of "monopoly" and "combinations in restraint of trade" in an uncertain condition necessarily resulting in suits and prosecutions in which courts and jury must determine in every case whether there was restraint of trade or attempt to monopolize, and all this with results of very doubtful value to the community. The real difficulty lies in the fact that the nation has not as yet thought out any intelligent legislative programme which will adequately deal with new and largely untried economic conditions. FREDERIC R. COUDERT.

THE QUANDARY

BY JAMES M. BECK

THE litigation just ended represents an important, though passing, phase in the conflict between the age of the wheelbarrow and that of the aeroplane. The issues involved were something more than "nice sharp quillets of the law." The Sherman Law, originally intended as a mere policing of the channels of interstate trade, to free them from such obstructions as were unlawful at common law, had become an economic theory, and attempted to reconstruct society by defending the primitive individualism of the age of the wheelbarrow from the greater individualism, which in the age of steam and electricity finds its highest expression in association. The ultimate solution of this struggle has probably been advanced by the action of the Court in holding that the whole problem must at least juridically be approached

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in the spirit of "sweet reasonableness." Beyond defining the attitude of the Court as one of reasonableness, the decisions, however voluminous, suggest little that is tangible in the solution of the vexed problem of reconciling the liberty to combine with the industrial independence of the individual. We are little wiser than before as to what a restraint of trade is under the Sherman Law, or what restraints will be hereafter regarded as unreasonable. While we are admonished that the "normal" growth of business expansion is permissible and the abnormal inhibited, little light is shed by the judicial lamp of reason upon the social or legal principles which shall hereafter distinguish the "normal" from the "abnormal." Still less do we know when the instinct for expansion becomes "unduly restrictive" of competition.

The demonstration has thus been that of the clinic rather than that of the philosophical laboratory.

This much is clear that two large business organizations are doomed to legal vivisection upon some general but undefined social and ethical principles, and we can only learn the lesson of the clinic by taking note of the conditions of the patients when they went under the surgeon's scalpel.

These two organizations were among the largest and most successful in the world. The same economic tendencies which originally made our nation a governmental unit made these combinations the recognized type of an efficient commercial unit, which produced the maximum of productive wealth with the minimum of waste. Neither became what it was by the governmental favor of bounties or tariffs. Each competed with all comers not only in this country, but in the markets of the world, and each demonstrated in their respective industries the superior force of American energy. Each built up a world-wide trade, which has brought to our country incalculable wealth. Each has been remunerative to their investors, concededly a benefit to the consumers both in the quality and cost of their products, and each, far from restricting trade in any practical way, gave to it an enormous expansion. Neither was in fact a monopoly, for each was confronted with a growing competition. When their histories shall be written it will be said that, however deplorable from an ethical standpoint some of their incidental methods undoubtedly were, especially in the past, the controlling cause of their marvelous growth and world-wide success was inherent in combined capital, scientific management, efficient

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organization, untiring energy, and extraordinary business sagacity. If they did not always remember the Golden Rule, neither did their competitors. The policy of the law required them to compete and they competed—but it seems too successfully. They too were subject to an unyielding economic law that the tendency of competition is to restrict the number of the competitors, for as Napoleon once said: "You cannot make an omelet without breaking some eggs." Having outstripped all their competitors in this or any country, they are now under the mandate of a drastic law, which represents the discarded policies of more primitive times, penalized for their success, which is judicially held to be such a menace to individual enterprise as to be injurious to the public welfare. The policy of a law which not only authorizes but compels an individual or corporation to compete, and then penalizes them if they compete too successfully is not unlike the graciousness of the fond mother who gave her daughter permission to go out to swim, but sternly forbade her to go near the water.

How far has this doctrine of reasonableness taught others to beware of the fate of Standard Oil and American Tobacco? What are the limits of permissible growth? What proportion of a given trade may any competitor by his energy and resources secure? How strong must the "dram of eale" ("Hamlet," Act I, Scene IV) of "unreasonable" business methods be to adulterate the "substance" of legitimate power inherent in combined capital, associated energy, and scientific management? When must the successful man or combination pause on the margin of the sea and lament that he can conquer no more worlds because further growth will be visited by the indictment of a Grand Jury or the injunction of a Chancellor? To these questions what answer have we?

Even if the decisions were lighthouses, which would serve to warn other hardy and adventurous mariners of the legal rocks upon which the Standard Oil and Tobacco companies were wrecked, they are not a chart or compass to enable these same mariners to navigate the seas. Indeed, until the *terra incognita* of the "unreasonable" is discovered and charted by some judicial Livingstone or Peary, the administration of the Federal law as to the rights and limits of combination will be in a state of economic anarchy.

I do not criticise the Court. It could only enforce as best

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it could a cryptic law. It faced a crisis in the administration of law of extraordinary difficulty. It had given in the Trans-Missouri and Joint Traffic cases a literal interpretation to the Sherman Law, which, if impartially enforced by the Executive Department against all combinations within the spirit of the decisions, would have resulted in business chaos. At least twelve hundred industrial corporations, with capital and resources easily exceeding $10,000,000,000, had been formed by the voluntary combination of individuals, theretofore competitors, and each of these combinations had necessarily resulted in a technical restraint of trade, if that obscure legal phrase is practically synonymous with the diminution of competition. This interpretation of the law, as was happily said by Justice Holmes in his dissenting opinion in the Northern Securities case, "would make eternal the *bellum omnium contra omnes* and disintegrate society, so far as it could, into individual atoms. . . . *It would be an attempt to reconstruct society.*"

Such a law was impossible of enforcement. To avoid committing a great, practical industrial nation to a policy of harikari, successive Attorneys-General necessarily ignored its impartial enforcement and as a sop to a supposed public sentiment brought suit only against a few of the larger and more unpopular combinations. A government of caprice was thus substituted for a government of law, and in the vital matter of industrial organization, while a few combinations transacted their business under the shadow of a legal guillotine, many others pursued with impunity the same business methods, adopted the same forms of business organization, achieved relatively to their respective industries the same successful results, and enjoyed relatively like dominating power.

This enforced policy of executive favoritism could not long endure in a government which was happily defined by Justice Brewer to be "one of laws and not of men." Its demoralizing results were patent. It bred a spirit of lawlessness, destroyed faith in the basic principle of our government, the equal protection of the laws, and compelled proud men to stoop to the purchase of immunity by flattery and other forms of sycophancy.

When Mr. Taft became President the situation had become intolerable. Business men pursued their activities under a cloud of doubt and in the shadow of possible prosecution.

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In the mean time combinations in obedience to the law of competition, which compelled lesser units to merge in order to meet the larger units upon less unequal terms, came into existence, grew and waxed great, for, as the grave-digger said in "Hamlet":

"Your dull ass will not mend his pace with beating."

The unhappy position of the business man was intensified by the fact that not only had the administration of law ceased to be impartial, but neither bench nor bar had any clear idea what was legal or illegal. Business could probably have adjusted itself to almost any economic theory, however archaic, provided that the rules of the game were clearly defined and impartially enforced. But the business man vainly sought the light as to what the Sherman Law meant by its sweeping and general phrases, but in the end his plight for the last ten years has been that of Belshazzar:

"The king cried aloud to bring in the astrologers, the Chaldeans, and the soothsayers. And the king spake, and said to the wise men of Babylon, 'Whosoever shall read this writing, and shew me the interpretation thereof, shall be clothed with scarlet, and have a chain of gold about his neck, and shall be the third ruler in the kingdom.'

"Then came in all the king's wise men; but they could not read the writing, nor make known to the king the interpretation thereof.

"Then was King Belshazzar greatly troubled, and his countenance was changed in him, and his lords were astonished."

The Supreme Court has interpreted the cryptic characters of the Sherman Law as announcing the "rule of reason." Wall Street acclaims this as a solution in the hope that a temporary sentiment of enthusiasm may push the wheels of industry through the slough of despond. But hard-headed business men either recognize or will soon recognize that presidents, attorneys-general, district attorneys, grand juries, petit juries, and courts will soon differ as to what the "rule of reason" is. That it will little relax the law as to restraint of trade, as applied in the reign of Queen Elizabeth (and long since repudiated by the English bench) can be seen in the recent decision of our Supreme Court in the Parks medical case, which holds that a manufacturer may not sell his own product upon conditions as to the price of resales.

When Mr. Taft became President, he stated that it would be his policy to enforce the law impartially. He, the upright Judge and fair-minded Executive, knew full well what such

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a policy would entail. Possibly he solaced himself with Grant's practical reflection that the "only way to secure the repeal of a bad law is to enforce it." He said in his message of January 7th, 1910:

> "But such an investigation and possible prosecution of corporations, whose prosperity or destruction affects the comfort not only of stockholders, but of millions of wage-earners, employees, and associated tradesmen, must necessarily tend to disturb the confidence of the business community, to dry up the now flowing sources of capital from its places of hoarding and produce a halt in our present prosperity that will cause suffering and strained circumstances among the innocent many for the faults of the guilty few."

These were and will, I believe, continue to be prophetic words.

To carry out this policy in accordance with the manifesto was a physical impossibility, but if suits had been simultaneously brought against the 1,200 industrial corporations and the many railroad corporations which were within the literal provisions of the statute, there would have been an acute panic and wide-spread disaster. Edmund Burke once said that you could not indict a people. Indeed, future generations will reflect with astonishment upon the spectacle of an enlightened government during the last two decades harrying its own business men for obedience to economic laws. As Disraeli once said: "The government sinks into a police."

Such was the real crisis which confronted the Supreme Court when it considered the Standard Oil and Tobacco cases. It could do little to save a dangerous situation unless it was prepared to disregard its own precedents and conform the interpretation of the statute to the reasonable necessities of the American people and the obvious tendencies of an age pre-eminently of combination.

It chose a course, difficult to justify, as Justice Harlan's powerful dissenting opinion well shows, on strictly technical grounds and with due regard to the principle of *stare decisis*, but amply justified upon the broader consideration of the public welfare. *Salus populi, suprema lex.* It gave a new and more reasonable interpretation to the statute. While it has not solved a vexed question, it has at least made its ultimate solution a possibility. In doing so, the court simply applied a well-recognized and elementary rule of interpretation. Language is at its best an unhappy vehicle of thought,

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and whether in a contract, a statute or a constitution, a court always subordinates the mere letter to its obvious purpose and reasonable spirit. The rule was well stated by the same great court as follows:

"The laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such case should prevail over the letter."

Defending this rule of construction from the charge of judicial legislation, the Supreme Court said in the Holy Trinity case:

"This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case."

Popular government would be intolerable unless there was latitude in the interpretation of written laws, for, paraphrasing an epigram of Voltaire with reference to Russia, democracy is a popular despotism tempered by constitutional limitations and judicial interpretation. If, therefore, the present reasonable construction had been given to the statute in the Trans-Missouri and Joint Traffic cases—and the present Chief Justice contended for it as vigorously then as now—it would, I believe, have received general acquiescence and by this time we would have had a series of constructive decisions which would have reconciled upon broad and enduring lines the right of combination with the liberty of the individual; but unfortunately the court sacrificed in the earlier cases the spirit of the statute to its letter, and since then the business interests of the country have been floundering in a very quagmire of uncertainty. Nor will they escape from this fateful morass until the courts give a clear and tangible definition to their "rule of reason."

To many the reversal by a court, which is supreme in fact as in name, of its own deliberately adjudged decisions, weakens its prestige, but this, I think, is a superficial view. The Supreme Court does not pretend to omniscience. Here are nine individuals, exercising the gravest governmental

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power in the world and applying rules of action to interests so vast as to stagger the imagination. Overburdened with work and facing responsibilities that are beyond any possible power of accomplishment, the Court is required to decide in weeks and months questions whose rightful solution requires years. Under such circumstances, how can we reasonably expect that absolute consistency which could only co-exist with infallibility? No court in the world has a history of greater honor and more beneficent achievement than the Supreme Court of the United States. If at times Homer has nodded, why in the nod of an overburdened mind should we forget the glorious heritage of the Iliad? In laying down rules which affect the infinitely complicated mechanism of business, it can often only determine the wisdom of its conclusions in the light of practical results. With it, as with any other body of men, hindsight is at times the only practicable wisdom. Far from entertaining a diminished respect for the court, which recognizes the error of its previous adjudication, we should rejoice that the Court is able, like the wise man of the childhood ballad, who, having scratched out both his eyes by jumping into a bramble bush, is able, by jumping back again with all his might and main, to "scratch them in again." The Sherman Law was the bramble bush.

To the student of our institutions the more interesting question suggests itself whether the practical application of the "rule of reasonableness" will not involve an extraordinary assumption by the judiciary of essentially legislative powers. This is emphasized by the decree of the Supreme Court in the Tobacco case, which requires the lower court to recreate by "disintegration" a new condition in "honest harmony" with the law. Having determined that Congress intended to forbid any combination which is injurious to the public welfare, the Supreme Court now assumes, as a judicial duty, the determination of what forms of business activity are thus injurious and what are the limits of permissible growth. This requires it to lay down principles of public policy, which seem to me essentially legislative in their character. Had Congress inserted the word "unreasonable" in the statute and left it to the judiciary to interpret and apply, the judiciary might well have declined to do so on the ground that it was a virtual delegation by Congress of its duty to legislate. This is even more true when it is the Supreme Court, and not Congress, that has inserted in

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the statute the qualifying adjective "unreasonable." President Taft clearly showed this in one of his recent messages to Congress. He said:

"It has been proposed, however, that the word 'reasonable' should be made a part of the statute, and then that it should be left to the court to say what is reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly. *I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to best judgment.* It is to thrust upon the courts a burden they have no precedents to enable them to carry, *and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster.*"

These were brave and sagacious words and their full significance will only develop in the light of experience as the courts attempt to apply the vague rule of "reasonableness." While the social compact, in our country represented by the Constitution, permits the natural liberty of men to be restrained by such "just and equal" laws as the common welfare requires, yet it is equally fundamental in a free government that such laws should clearly define what is permitted and what forbidden. Otherwise ours would be a government of men, not of laws. In the case of Chicago *vs.* Day, Justice Brewer held that a penal statute forbidding a railroad to charge an "unreasonable" rate would be void for want of certainty,

"for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."*

The statement above quoted was that of Justice Brewer, sitting in circuit, but in United States *vs.* Reese, decided in 1874, Chief-Justice Waite, speaking for the Supreme Court, said:

"If the Legislature undertakes to define by statute a new offense and provides for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know when he is committing a crime. . . . *It would certainly be dangerous if the*

* He illustrated his meaning by a citation of the Chinese Penal Code, which punished any man with forty blows who was guilty of "improper conduct." It is true that this great jurist only had reference to a criminal statute, but—at least—in its ethical aspects there can be no sound distinction between a Delphic law, which imprisons a man for an offense and which leaves the definition of the offense to each jury, to be determined by caprice or varying judgment, and a similar law, which restrains liberty of action, forfeits property, or otherwise impairs a man's natural liberties.

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Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the Government."

Chief-Justice Marshall said in United States *vs.* Wiltberger, that "it is the Legislature, not the court, which is to define a crime and ordain its punishment." And yet our Wall Street Mark Tapleys are now rejoicing in the very vagueness of the term "unreasonable," probably on the principle of the King in the trial scene of *Alice in Wonderland,* who was glad that some documentary evidence was without definite meaning, for, as he said, "that would save a lot of trouble."

This humane principle as to the necessary definiteness of a law is not novel, for even the civil law, developed in the time of the Cæsars, said, "*Ubi jus incertum, ibi jus nullum.*"

This salutary principle has never been recognized in our trust legislation. The cruel mockery of the Sherman Law has been that each business man, under the peril of possible imprisonment, has been required to interpret infallibly a statute which the Supreme Court itself has failed to interpret consistently for twenty years and as to which it has at length reached no more definite conclusion than that business men must avoid any "unreasonable" restriction of trade.

Chief-Justice White, in my judgment the ablest dialectician of the Supreme Court since Marshall's time, justifies the assumption of legislative power to determine what is reasonable in the matter of economics by referring to the fact that courts have immemorially determined, upon complex and often conflicting facts, whether a litigant has been guilty of fraud, and he suggests that the word "fraud" is as elastic in meaning as "reasonable." I confess that I cannot follow the analogy. Whether a party has been guilty of a fraud depends upon certain sharply defined moral principles upon which, as plain matters of right and wrong, all reasonable people are in accord and which are therefore axiomatic, but in determining what is reasonable, as affecting favorably or adversely the public welfare, the court must enter upon the whole vast domain of economics. Fundamentally the court must consider whether the prevention of the waste incident to unrestricted competition outweighs, as a public advantage, the power which such restriction gives to oppress the consumer with exorbitant prices. This is not a question

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about which all men are in accord. On the contrary, it is one of the vital issues between socialism and individualism. The underlying question, therefore, as to how far combination is for or against the common weal goes to the very foundations not only of government, but of society. It involves the vital question whether the machinery of society is not to-day proceding more through voluntary associations of men than through merely political agencies. In the modern industrial state, boards of trade, clearing houses, labor organizations, traffic associations, even Judge Gary's famous dinners, play a larger and more useful part than Washington bureaus or Federal commissions. All these are questions of public policy and upon these, in my judgment, the legislative branch of the government is alone under our Constitution competent to pass. It was never intended that the judiciary should formulate the public policy of the nation. The reason is obvious. The judges are appointed and hold their positions for life and are therefore independent of the popular will. The representatives in Congress are theoretically the true representatives of the people and they and they alone must determine the fundamental questions of public policy, which are involved in the permissible limits of combination.

The Supreme Court in its wisdom has decided otherwise. It has assumed a crushing burden. The Federal Courts in applying the rule of reasonableness must now determine the limits of combination, the lawful and unlawful forms thereof, the economic necessities of a people, the degree to which competition may be restricted, the ethical character of commercial methods, the invalidity of different forms of competition, the degree to which the telegraph, the railroad, and the steamship may be utilized in consolidating different and competing units into a more efficient and non-competing unit, the proportion of a given trade or industry that a given individual may enjoy, how far prices may be regulated to prevent loss and how far production can be restricted to prevent waste. In other words, they must now be the arbiters of conflicting schools of philosophy and economic ideals. Which was right, Jefferson and Adam Smith, or Hamilton and Karl Marx, the individualism of Herbert Spencer or the socialism of John Ruskin? I cannot envy them their self-imposed burden.

I agree that all these questions can be more intelligently passed upon by the judiciary than by the Legislature. It

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has been the experience of both England and the United States that regulations of trade could be effected better through judicial interpretation than through legislative action. Written statutes have a certain rigidity, and, when applied to complicated facts, are too inelastic for practical use. The courts, however, in deciding successive questions upon concrete facts can cautiously and conservatively suggest definite principles of public policy and can adapt these principles by judicial interpretation from time to time to the expansion of industry and changing social conditions. Indeed, the law as to restraints of trade has been largely developed by the judiciary, but this has arisen from the practical workings of the English Constitution, under which the judges had unquestioned legislative powers. The common law of England is judge-made law and the essentially legislative character of many of its rules have been disguised in the ingenious fiction that the principles of the common law are based upon immemorial usage and unrecorded acts of the legislative branch of the government. No such fiction exists in our constitutional form of government. Its basic principle has been the separation of the executive, legislative, and judicial branches. The United States has no common law as such and the Federal Courts have no power as the English bench to formulate rules of economic policy in the absence of legislative action. Their power is restricted to the Constitution and statutes of the United States. The Sherman Anti-Trust Law neither delegated nor could it constitutionally delegate to the Federal Courts the power to formulate rules of public policy with reference to combinations.

This assumption of legislative power, however, simply follows the trend of our constitutional evolution, which is rapidly obliterating the line of demarcation between the three co-ordinate but theoretically independent departments of the government. Thus, the Supreme Court in the Granger cases, decided in 1876, held that the power to fix the compensation of a public utility corporation was legislative, but in a later case it assumed the right to determine under the Fourteenth Amendment whether the rate prescribed by the Legislature was reasonable. This in effect gave to the judiciary the ultimate power of fixing, although not initiating, the rate of compensation. For this assumption there was the justification of enforcing the Fourteenth Amend-

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ment, but in the present assumption of power to determine the reasonableness or unreasonableness of different forms of combinations and thereby to regulate, by permissions and prohibitions, the whole field of economics, no such constitutional power can be invoked.

The doctrine of Montesquieu as to the distribution of all governmental power among three separate bodies of magistracy, namely, legislative, executive, and judicial, was, as Madison affirms in No. 47 of the *Federalist,* recognized by the Constitutional Convention as the very foundation of its labors. The fathers believed that where there was a union of these powers in one man or one body of men, there could be no public liberty. As Justice Miller said in Kilbourne *vs.* Thompson (103 U. S., 168), this distinction has always been regarded as "one of the chief merits of the American system of written constitutional law," and he added:

"The perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

Until recent years, when the tidal wave of socialism has swept our institutions somewhat from their ancient moorings, this was the accepted doctrine of the American people. The axiom of Locke in his essay on Civil Government was still accepted as basic that "the Legislature neither must nor can transfer the power of making laws to any one else nor place it anywhere but where the people have." But in this as in many other respects our institutions have inevitably felt the centripetal influences of steam and electricity. Even before the railroad and the telegraph, Napoleon sagaciously said, on the eve of the 18th Brumaire:

"Notwithstanding our pride, our thousand and one pamphlets, our endless speechifyings, we are very ignorant in political and social science. We have not yet defined what we mean by the executive, legislative, and judicial powers. Montesquieu's definitions are false. In fifty years I can see but one thing that we have defined clearly, which is the sovereignty of the people; but we have done no more toward settling what is constitutional than we have in the distribution of powers. The organization of the French nation is, therefore, still incomplete. This legislature, without eyes or ears for what surrounds it, should no longer overwhelm us with a thousand laws passed on the spur of the moment, that negative one absurdity by another, and that leave us, with three hundred folios of laws, a lawless nation."

Mutatis mutandis, Napoleon's criticism could be applied to the present workings of our American system of government. Both to the executive and the judicial branches of govern-

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ment there has been in recent years the most palpable delegation of purely legislative functions, and this is largely due to the inability of Legislatures to adjust the statutes to the complicated facts of modern society. Congress has often contented itself, as in the Sherman Anti-Trust Law, with stating in vague terms an object or purpose and then leaving to the Executive and to the judiciary the formulation of the real laws.

It is not unnatural that our country, whose system of government is essentially English, should follow the genius of English institutions in practical administration, while proclaiming its adherence to the political philosophy of Montesquieu, but there has never been before and there is not likely ever to be again a more striking and far-reaching assumption of legislative power than that which is involved in the present trust decisions in committing to the Federal Courts substantially the entire question as to the regulation of the rights of men to combine their energies and resources. Such assumption recalls the prophetic warning of Thomas Jefferson:

> "It has long been my opinion that the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary, *an irresponsible body working like gravity by day and by night, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped.*"

Who can say that this striking characterization of the Federal judiciary as a "thief of jurisdiction" can be said to be without some justification?

But some one may say, why comment on the decision at all? Is it not its own gloss? The Court of last resort has spoken. Its voice is final. What it declares to be the law is of necessity the law, to be recognized and accepted by all as the law until the legislative branch of the government constitutionally declares otherwise. To this I reply that a reasonable discussion of a Supreme Court decision not only involves no disrespect, but may have its value, especially where the question litigated has its large and important political and social aspects. It then no longer concerns the immediate litigants alone, but the public at large, and is as open to public discussion as any other political or social issue, although in a less degree. While it is the law, to be accepted as such, yet the liberty of opinion which the Constitution guarantees still leaves open the essentially political question whether it ought to be the law.

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Such popular discussion is helpful to the Court itself, whose decisions upon grave questions of public policy must often be tentative and subject to its own revision. Thus when the Court in the Granger cases (Munn *vs.* Illinois) expressly held that the Legislature could regulate the charges of public-utility corporations and that such right was beyond judicial review as to its reasonableness, the business interests of the country were alarmed as by a fire-bell in the night. If the railroads could only enjoy such earning power as the caprice of any Legislature might permit, then railroad securities were of little value and could be destroyed at will by confiscatory legislation. When the Court, as a result of a public discussion of its decisions, saw the irreparable disaster that would befall corporate investments if the reasonableness of legislative rates were beyond judicial review, it reversed its own ruling and thereby saved many of the railroads from bankruptcy. While the Supreme Court does not, as Mr. Dooley once irreverently said, "follow the election returns," yet it is neither oblivious to nor uninfluenced by, an intelligent and dispassionate public sentiment.

Similarly in the matter of the Sherman Anti-trust Law, the insistent public discussion of the doctrine of the Joint Traffic and Trans-Missouri cases and the multiplying evidences of serious consequences, if such doctrine were impartially applied, has at length convinced the court of its previous error and it is safe to predict that in the future development of the "law of reason" the Federal Courts will be largely aided by a respectful and intelligent discussion of the grave economic questions involved in the present attempt to interfere by law with the complicated mechanism of business.

The problem is a very difficult and important one. It will require, in its final solution, the statesmanship of the legislator, the judicial mind of the court, and the practical experience of the business man. The American people are not willing that all the business of the country shall be concentrated in a few hands. Upon the other hand, they are not willing to disintegrate it into individual units. Some middle ground must be found.

I have great faith that the solution, however long delayed, will ultimately lie along lines in harmony with the natural liberty of association and the expanding genius of our age.

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A great and aggressive nation will not long permit itself to be confined in a legislative straitjacket inherited from the time of Queen Elizabeth. Her times were "spacious days" for literature and maritime adventure but not for human liberty. This is not the age of the wheelbarrow, or even of the locomotive. It is the age of the aeroplane, when men sweep the very eagles out of their course in midair.

The Sherman Law is an anachronism in the age of steam and electricity. Ajax defying the lightning has never impressed me with his wisdom. I much prefer the homelike but more practical spirit of a Franklin, who not only disarmed the lightning, but turned electricity to practical uses of great moment. The statesmanship of the future will consider a law, which, while forbidding in clear, positive and scientific language, the abuses of combination, will yet recognize that the spirit of association is at once the most potent and noble manifestation of present civilization.

To this end, the Trust decisions just announced will undoubtedly contribute in their clear recognition that the law is impotent to forbid all combinations which incidentally restrict competition, but the problem is, in its last analysis, legislative in character, and what is imperatively needed is a saner public sentiment, which will compel Congress to conform the laws of business to the irresistible and centripetal tendencies of steam and electricity.

JAMES M. BECK.

THE REMEDY

BY SAMUEL UNTERMYER

THE decisions mark a most important epoch in our political and economic history. They have breathed new life and vitality into the law. Even so, we are at last brought face to face with the question of whether, at this late day and after all the vast and irreparable injury has been done which the statute was intended to prevent and would have prevented if it had been honestly enforced, this law is still capable of solving the problems it was intended to meet.

The fact that it has taken us over twenty years to begin (if we really have begun) the carrying out of a solemnly enacted National policy is a self-condemnation of our ca-

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pacity for government more scathing and deserved than any criticism ever passed upon us by our most malignant enemies. In all that time we have made no impression upon the evil at which the law was aimed except to see it spread and accentuated, until its baneful influence is felt in almost every department of human endeavor and has infected our entire body politic. It has been allowed to become a cancerous growth which can no longer be uprooted and eliminated without shaking the foundations of our credit and prosperity.

The most formidable of the trusts have had their birth and development under the very shadow of the law which was intended to destroy the few that then existed and to prevent and punish the creation of others.

When Congress in its great wisdom and foresight enacted this law and intrusted its administration to the executive and judicial departments of the Government, the problem could have been easily solved by the use of the effective machinery which was provided and which has proven itself to have been admirably adapted to the purpose. The law is a model of simplicity. Within its brief compass are contained four distinct, comprehensive, and independent remedies: (1) to enjoin the creation of the combination, (2) to punish for its formation or continuance, (3) to seize its property in interstate transit wherever found, and (4) to destroy and dissolve it by the judgment of the Court.

The last remedy is the most difficult and unsatisfactory and the least effective, although it is the sole remedy that has until very recently to any extent been invoked, and then only in the most unequal and spasmodic way.

Whilst these cases were under consideration by the Court, in an address delivered on January 12th, 1911, at the Annual Meeting of the National Civic Federation, entitled "Extermination *vs.* Regulation of the Trusts, Which Shall It Be?" the writer summarized the then existing situation as follows:

"Judging from the uniform trend of the decisions of that Court for the past five years, it is not unlikely that the principle announced by the lower Courts in those cases will be not only affirmed, but *emphasized in the most sweeping fashion* by our highest tribunal, and that every form of combination the *direct* purpose and effect of which is to hamper or limit competition will be condemned.

"Unfortunately for the welfare of the people, I am not, however, satisfied that the decisions will afford any substantial relief from the dangers that are threatening us or that they will either furnish or point out a practical

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solution. The provisions of the judgments are drastic, but it does not follow that they are enforceable in practical operation. The companies appear to me to have nothing to fear from the result beyond possible changes in the forms of their organizations.

"The properties and business are there, they belong to the shareholders, and there is no way of confiscating them even if there were a disposition to do so, which happily there is not. The thought of disbanding the central organizations and resolving the constituent companies into their original parts presents an impossible problem. . . ."

A further study of the subject in the light of the decisions confirms the views then expressed.

From the very beginning the execution of the law was intrusted to unfriendly hands and so it has continued to this day. That is the key to all our present difficulties and to the many worse ones that are to come.

Throughout five successive administrations the enforcement of the law has been shirked, evaded, and treated with a degree of insincerity that surpasses anything of the kind in our National existence, until by reason of the long immunity and encouragement to its continued violation we are to-day confronted with the danger that because of the vast power of the offenders and the magnitude of the interests involved the task has grown beyond control, and we shall be forced to resort to other methods to supplement those that were then furnished and were at that time adequate for the purpose.

This criticism applies with equal force to the single Democratic administration as to the Republican administrations that preceded and followed it, and especially to the present administration, which is concentrating upon the "Anti-trust Department" of its marvelous Press Bureau and upon the beginning of aimless, never-ending, but utterly ineffective suits purporting to be directed against the dissolution of the offenders, all the energy that should have been directed to the prompt and genuine enforcement of the remedy by injunction and the criminal sections of the law.

During all these years there has not been a single case out of the many that have been inaugurated in which the evidence produced by the Government in the civil suits and which formed the basis of an academically successful outcome would not have been equally conclusive in a criminal prosecution or through the summary process of seizure under Section 6 of the Act.

To those who regard the recent decisions as instilling new

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strength into the statute and who are so confiding as to have preserved their faith in the desire of the Government to enforce the law impartially, the semi-official announcement of the Chief Law Officer of the Government, made a few weeks ago following the decisions, that no criminal prosecutions would be considered until after the expiration of the time fixed for compliance with the decrees of the Court, will come as a surprise. To the "doubting Thomases," it may appear like a continuation of the policy of procrastination to the accompaniment of much noise and fuss and feathers and ending in nothing.

It is at least difficult to understand the relation between the dissolution of the corporation and the long delay in the enforcement of the criminal section of the statute.

It is not usual for the Government to stay criminal prosecutions whilst invoking its civil remedies, especially where, as in these cases, it may be inviting the plea of the Statute of Limitations with respect to some of the offenses charged. The Government did not find this course necessary in its recent prosecutions of the Beef Packers or in the case of the American Sugar Refining Company, in both of which it *first* brought the criminal prosecution for violation of the Anti-trust Law and followed it later with the suit for dissolution of the corporation—both of which are now pending.

Here we have two cases in which the Government has judgments of the Court dissolving the corporations whilst in the Packing and Sugar cases it has no judgment. Yet we are told that we must continue to wait. Why these discriminations? The reason assigned is a trifle obscure. Is this way of administering the Law calculated to add to the respect or confidence of the community for governmental methods?

I do not mean to imply that there should be criminal prosecutions in any of these cases at this late day in view of the encouragement and tacit assent to their legality that have been given to the formation and development of the trusts during all these years. Such of the companies as are willing in good faith and to the fullest extent of their ability to assist in executing the judgment of the Court, segregating and dissolving them, ought to be relieved from criminal prosecution under the circumstances. But there should be no such peculiar processes as have characterized the enforcement of the law.

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Equally unconvincing is the assertion made by the able and distinguished Attorney-General in this same announcement, by way of apology for past inaction, to the effect that juries have been reluctant to convict and courts have been unwilling to impose prison sentences in these cases.

Have not cause and effect been rather confused in the making of these statements? If juries have been unwilling to convict or courts to impose prison sentences in the isolated instances of insignificant offenders in which prosecutions have been undertaken, was it not because of the apparent unfairness of the selection of cases for prosecution? Is it not true that the small and helpless and comparatively harmless combinations in the temporary form of pools and trade agreements were the ones thus pursued, whilst the powerful, dominating combinations that were in the permanent and most dangerous forms of consolidations were left undisturbed?

In so far as the criminal sections of the statute have been invoked it has savored of persecution. Courts and juries have rightly refused to lend themselves to the perpetration of such manifest injustice.

How could any court or jury, with the common instinct of human justice, have been expected or asked by a public officer to send these small fellows to prison when every judge and juror knew from his daily experience of the immunity from prosecution that was being extended or permitted to the big fellows?

Note, for instance, the easy frankness, cheerfulness, and unconcern with which the chief officer of the Steel Corporation has been testifying before the Senate Committee concerning the way in which prices are regulated in that industry. The only difference between the facts of that case and the pooling and trade agreements whose members have been prosecuted is that the Steel Corporation dominates the industry, it almost controls the railroad situation indirectly, and it has many ways with which most of us are familiar of compelling obedience to the "gentlemen's agreements" made with it, whilst in the other case there is no remedy against the member who breaks or repudiates the agreement, for it is recognized to be illegal and cannot be enforced by any of the parties. Yet Mr. Gary has told us nothing that we have not known for many years and that is not applicable to other businesses, for these things have been done by the

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company in the open light of day with no attempt at concealment. Everybody understood that the Steel Company and the independents have for years been fixing prices.

The reason assigned by the learned Attorney-General for the continued non-enforcement of the law is more than amazing—but for one's respect for his high office it might be justly characterized as frivolous. Why not admit at once what every one familiar with the subject feels—that the Government has by its action (or non-action) in years past misled the business, financial, and investing world into the belief that they were acting within their legal rights in embarking upon these enterprises and that it is more largely than the offenders responsible for the present situation? The condition is rendered the more inexcusable by reason of the fact that whenever in the past ten or fifteen years the law has come before the Supreme Court it has been sustained and strengthened. There has at no time been any justification in the attitude of the courts for the contemptuous treatment accorded the law at the hands of the Government.

It will be time enough for our officials to complain that the enforcement of the statute is unpopular or that it is not supported by public sentiment when they have made the effort to enforce it impartially. The fact is that they are rapidly, however reluctantly, awakening to the knowledge that it is the most popular law upon our statute-books and that the people are insisting upon its vigorous and *impartial* enforcement.

With every desire to avoid injustice to the authorities having in charge the execution of the law, it is impossible to resist the conclusion that they have not been in sympathy with and were not really anxious to support the economic policy announced by the law. How can we otherwise account for the failure during all the years in which these gigantic combinations were forming to resort to the simple and comprehensive remedy of enjoining their creation by injunction as pointed out by Section 4 of the Act, or of seizing their property in transit under Section 6?

Here again the case of the Steel Corporation by way of illustration is a fair test of the justice of this criticism. Its formation was heralded for months in advance throughout the news columns of the press of the country. Formal and official notices that it was about to be launched were

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published broadcast as advertisements by Messrs. J. P. Morgan & Co., who were the official bankers and promoters of the enterprise, in the newspapers, addressed to the shareholders of the constituent companies, containing the fullest details of the basis on which the stockholders were to be allowed to participate in the exchange of their securities for those of the colossal new company, with its one and a half billions of new stock-and-bond issues in addition to the hundreds of millions of underlying bonds and of floating debt of the constituent companies.

The Steel Corporation and its shareholders have a just grievance at this belated attack upon it, for its bold and astounding plan of inflation and illegality were fully and frankly exposed in all their amazing details. The organization of the company could readily have been prevented by injunction under the broad powers conferred by Section 4 of the Act in the same way in which that section was recently invoked to prevent the increase of freight rates by the railroads. But there was no crystalized public sentiment at that time against the movement. It is true that few of us quite appreciated the extent of the dangers as they have since been realized, although they had been plainly foreseen and were understood by those who had studied the problem, as is apparent from the fact that the Sherman Law had then been for eight years in existence. It is manifest that it was enacted primarily as a criminal statute to *prevent* further combinations and incidentally to rid us of the existing ones.

The creation of the Steel Corporation and of the hundreds of other combinations that were organized during that period could have been prevented by the use of this remedy by injunction or by the least sign of activity on the part of the officials charged with the execution of the law. Notice that the criminal section of the act would be applied would have been sufficient. Both of these sections—which together with Section 6 constitute the bone and sinew of the law—were left unapplied through all these years, whilst the Government contented itself with the most perfunctory, inadequate, and manifestly insincere and circuitous procedure looking to the undoing of combinations that might easily have been prevented from coming into existence.

The encouragement which the lax administration or non-administration of the law has given to the formation of

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these trusts and the extent to which the Government is responsible for the distribution of their securities over the entire civilized world should rightly be considered by our courts and legislative bodies in determining how to deal with the companies. At this late day we are not foot-loose to inaugurate a policy such as might have been enforced to prevent them from being brought into existence, even though we recognize the injury they have done and are doing, and the evil and danger they constitute to our institutions.

In dealing with this vast and complex subject we should first determine whether the Sherman Law as now construed is sufficient to meet the present situation, and if not whether it should be superseded or supplemented. It may safely be assumed that neither public sentiment nor good reason would support the repeal of the law or the relaxation of any of its provisions. The only sentiment in favor of amending the law comes from those engaged in violating it.

It was inevitable that the courts would be forced to take some such construction as has now been announced. To have held that every combination that had the effect of restricting competition, however remote and indirect, was within its condemnation would have reduced the law to an economic absurdity, and have made it applicable to such a variety of proper and necessary business arrangements as to have rendered its enforcement destructive to legitimate business, and to have placed a most dangerous power of discrimination in the hands of the Government.

Every agreement or combination between business men for their protection, the purpose of which is possibly to save the parties to it from business destruction, would have been brought within the prohibition of the act. Such a construction would have led to the most grotesque results, some of which have already been realized as above stated in the few criminal prosecutions against temporary pools and trade agreements that have been "successfully" concluded.

There is no force in the contention that is being made in some quarters that the Law as now construed is too indefinite to be applied as a criminal statute. The argument advanced is, that what is or is not a reasonable restraint of trade now depends upon such a variety of conditions and is so uncertain in its definition that no criminal offense can be predicated of its violation. It is said in this connection

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that intent to commit a crime which forms so essentially a part of a criminal offense will be predicated of an act when the party charged with its commission cannot know whether he had a criminal intent until so informed by a jury as a result of his trial for the crime.

The manifest answer is that we are all conclusively presumed to know the law and that convictions would only be asked in cases in which the jury could readily be satisfied that the main purpose of the combination, and that which it accomplished, was a substantial control of the particular industry so as to be able to regulate both prices and output.

Those pools, agreements, consolidations, and other forms of combination that were entered into for self-preservation or to prevent ruinous competition or to protect the small dealers against extermination by their powerful competitors, and those which in their operations demonstrated that they were not levying tribute upon the public would be in no peril. The question in each case may safely be left to the good sense and business judgment of a jury to determine, under instructions of the Court, whether upon the particular facts of that case the parties had a criminal or a lawful intent.

The one would be defined as having for its purpose the control of the industry so as to be able to regulate prices. That would necessarily be evidenced in many ways, among others by the manner of dealing with outside competition; whether competing plants were purchased and dismantled or prices arranged in certain sections of the country so as to destroy competitors and in a variety of other ways that are well known to those who have had to deal with this subject. The earmarks that distinguish the one from the other class of arrangements are not to be mistaken. There need be no fear of difficulty, with the facts before the Court, in enforcing the law so as to avoid injustice.

The criminal section has been rendered more and not less easy of enforcement by the sane construction placed upon the statute.

To those who believe in the economic policy of keeping free from restraint the arteries and channels of interstate commerce, a close study of the opinions will tend to dispel much of the misapprehension that followed the announcement of the first decision. That the Court has retraced its steps and has unsaid and undone much of what was decided in the Trans-Missouri and Joint Traffic Association cases is,

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however, hardly open to discussion. No one can read the opinions in those cases and the arraignment of Mr. Justice Harlan without conceding that the logic of the argument, based on precedent, is on his side.

With all due respect to that august tribunal which the members of the Bar so justly revere, the progressive, constructive policy of which we so profoundly admire, one is at times disposed to regret that the traditions of the Court do not seem to permit that it admit its fallibility and frankly announce that it has decided to reject, overrule, or change the law laid down in its earlier decisions, when that is in fact its real purpose, instead of resorting to circumlocution and to distinctions that do not always distinguish.

Would it not be better to recognize that the law is a progressive science, possessing all the elasticity necessary to meet changed economic conditions, and that the rules of law must be formulated and applied in the light of those conditions? We may, if we please, criticise and denounce that exercise of power as judicial legislation and as being in theory lawless and dangerous and contrary to the spirit of our institutions, as Mr. Justice Harlan and other eminent jurists of that great Court have from time to time arraigned it. The fact, however, remains that the bold and at times ruthless exercise of that power has averted many a grave crisis in the history of our country which could not otherwise have been met under the limitations and imperfections of our Constitution, and has made possible the fabulous growth, expansion, and prosperity of our country.

The danger from the arrogation of such power as supplementing and developing rather than construing our Constitution is more fancied than real, more theoretical than practical, as experience has shown, for never in the history of the Court has the power been used except where the urgency was great and never in a way that has not distinctly made for progress and justice.

If the strict constructionists are to prevail, most of the insidious and dangerous crimes of modern finance would have to go unpunished and the criminal provisions of the Anti-trust Law will continue to be a dead letter.

I refer, of course, to the impediments to prosecution formerly existing by reason of the Fourth Amendment to the Constitution, prohibiting the right of search and seizure of papers, and by reason of the Fifth Amendment that no

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person shall be bound to incriminate himself—which have now been removed. Under the earlier decisions and until it became manifest that the class of crimes which the law is now earnestly but not yet successfully trying to reach, could not be punished if the individual or corporation was allowed to withhold the books and papers that contained the evidences of the crime, there was no way in which the proof could be made. But when the urgency became pressing the Court met it by practically reversing the rule that had been laid down by it in United States *v.* Boyd, 116 U. S. (1) In the Al Adams case, where it affirmed the principle that even though the books and private papers of a person charged with crime were unlawfully seized in violation of his constitutional rights, the Court would close its eyes to the means employed and would allow them to be used against him. That was a departure from precedent, although the Court cited authority to sustain its position; but the changed conditions required it and they were met. (2) Later in the Sugar Trust and Tobacco Trust cases (Hale *v.* Henkel, 201 U. S.) and again within the past few weeks in the Wireless Telegraph Company case (Wilson *v.* United States) the Court denied the applicability of the constitutional amendments to individuals, officers of the corporations which were charged with crimes with respect to corporate books that were in their custody even where they contained entries of personal transactions. (3) In the case of Twining *v.* New Jersey, where it was decided that the Fourth and Fifth Amendments to the Constitution did not apply to prosecutions in the State courts under State statutes, and that a defendant charged with crime might be there compelled to testify against himself at his trial. (4) Still later and within the past few months we find the law officers of the Federal Government, with the apparent sanction of the law as now construed, inaugurating the practice of arresting individuals under indictment and simultaneously with the arrest breaking into their places of business and seizing and holding their private books and papers, as in the cases of Duveen Brothers, Sheftel, and various brokerage houses.

The last remnant of these constitutional safeguards is disappearing before our very eyes. With the limitations that are found to be in the way of the administration of justice thus removed, why hesitate at merely "moulding" or "construing" the acts of Congress so that they shall

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read as they *ought* to have read rather than as they *do* read, especially when the Court is satisfied that it is impracticable to procure their amendment so as to make them workable according to the " rule of reason."

I do not want to be understood as criticising the decisions referred to that appear to change the Fourth and Fifth Amendments " in the light of reason " and expediency. On the contrary, I approve the result, but fail to appreciate the reasoning and attempts at justification that accompany the decisions. They have blazed the way for the enforcement of the criminal section of the Anti-trust Law and for the punishment of crimes more dangerous to our institutions than all the ordinary offenses combined and that must of necessity otherwise go unpunished.

When we consider the history of the enactment of the laws on this subject and the circumstances under which these provisions were inserted in our Constitution, and that the defendant was at that time barred from being a witness in his own defense, there is just ground in the interest of the punishment of the most insidious forms of crime and those most difficult of proof for welcoming the abolition of this fetish of protecting a man against incriminating himself. The innocent man no longer requires it. The guilty should not be permitted to have it.

If it were possible—which it is not *as yet* under our system of jurisprudence—I would advocate the right of the prosecution to place the defendant on the witness-stand, as in continental countries, but only in open court and in the presence of his counsel and subject to many other modifications of their system in order to protect this right against the abuses that exist there.

But we have somewhat strayed from our text in the desire to add our tribute to the Court for its broad and statesmanlike construction of the Sherman Law as against the narrow and literal reading that was pressed upon its attention and which it had adopted in its early decisions before the value and necessity of that law were fully realized.

The Court was confronted with a difficult alternative. If it adhered to the *words* as distinguished from the spirit or meaning of the act, it would have to hold that every agreement or combination that tended to restrain trade was unlawful. Such a construction would render the law unjust, unpopular, unworkable, and ridiculous.

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To have attempted to enforce the law under the previously announced construction would have been tantamount to indicting a large proportion of the law-abiding business community of the country. It would have played into the hands of the interests against which it was aimed by rendering the criminal sections impossible of enforcement.

Now that the Court has, however, applied to the law the sensible meaning that it is only intended to cover a *direct* restraint of trade, its scope and justice are made apparent and it will reach the evils at which it is aimed.

It had, however, been hoped and expected that in applying this doctrine of the " rule of reason " in the construction of the statute the Court would have avoided the use of the ambiguous words " reasonable " and " unreasonable " as applied to restraints of trade and that it would have adopted the distinction that has been so ably discussed in a recent editorial in the New York *Times* between the restriction of competition and the restraint of trade. The Court might well have justified its conclusions by pointing out that the law was aimed only against the restraint of interstate trade; that it was intended to reach every form and manner of such restraint; that there is no such thing as a *reasonable* restraint of trade; that *every direct restraint put upon interstate trade is in and of itself unreasonable.*

On the other hand, every restriction of competition does not directly restrain trade. There are many wholesome restrictions of competition that have no appreciable effect on the course of trade in the sense of *directly* affecting or restraining it.

The construction now placed upon the law will render it effective, for it will be applied only against combinations whether in the form of consolidations, pools, or agreements (" gentlemen's " or otherwise) that clearly operate in *direct* restraint of interstate trade.

Those are the evils against which the Law was directed. Against those it will be applied without bringing upon the administration of justice the reproach that it is being enforced against a few whilst applicable to the great mass of business enterprise. It is to be hoped that we have seen the end of the spectacle of the Department of Justice engaging in the prosecution and punishment, as criminals, of little fellows banded together through temporary trade arrangements for self-preservation against their formidable

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competitors whilst leaving undisturbed the powerful offenders against whom the law was directed.

The excuse heretofore given that every agreement, however innocent and necessary, that tended to restrain competition was in violation of law will no longer answer.

This I take to be the scope and meaning of the decisions.

Nothing more salutary, nothing better adapted to promote respect for the law, has been accomplished by this great tribunal. No greater peril was ever averted than that of rescuing the law from the contempt into which it was in danger of falling by reason of the spasmodic and unfair method in which the authorities were floundering about in their aimless efforts to make the people believe that they were enforcing the law.

Will the decisions accomplish any substantial, practical results in restoring competition between the various constituent companies that were combined and which are now sought to be separated?

With great regret, but with equal confidence, we assert that they will not.

The judgments are very comprehensive in *form*. If they were literally enforced, so far from restoring competition, their tendency would be to further cripple it by prohibiting the parent company from engaging in interstate commerce, because it will be impossible for it to comply with the decree.

As a concrete example, which would equally apply to the Steel Corporation and many of the others, let us examine for a moment the practical operation of the judgment in the Tobacco case. Following the able and illuminating recital of facts in the opinion of the learned Chief Justice, we find that beginning with the combination of the cigarette factories, continuing through the absorption of the smoking-tobacco, plug-tobacco, licorice, tinfoil, snuff, cigar, and kindred branches of the industry, ending in the amalgamation of these various branches under one vast corporate ownership through its various holding and constituent companies, at every stage factories were closed, machinery shifted, and such a transformation of property and assets effected that the reinstatement or rehabilitation of the constitutent industries as separate and independent entities is generally conceded to be impossible.

In the same way brands, trade-marks, patents, and secret processes that represented the main assets of various of the

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businesses acquired have been discontinued or abandoned or have disappeared with the factories that were absorbed or have been transferred and mingled with the general fund.

But suppose the Court concludes to deal only with existing properties and assets, if that is possible. How and to whom are they to be distributed? Are the plants to be separately sold at public auction? If so, in connection with what brands or trade-marks? Is that to be arbitrarily apportioned, or are the brands to be sold independently of the factories with which they are now connected?

The control of the share capital of, let us say, the United Cigar Company, which owns the innumerable retail stores, is owned by the parent company. How are these stocks to be taken out of its control? Is the Court going to assume the task of finding a purchaser for the shares representing the ownership of these stores who will not operate them in conjunction with the factories controlled by the parent company? Hardly a likely contingency.

Are the present stockholders of the parent company to have the right to combine, through committees or otherwise, to bid on these various properties? I understand that the judgment forbids that course.

The procedure adopted in the Northern Securities case, which has been cited as a precedent for the course to be followed, here presents no analogy and offers no guide or suggestion. The holding company had there to deal only with the distribution of the shares of two constituent railway companies and a given amount of cash. It distributed the assets pro rata among its shareholders. The proceeding was exceedingly simple, and yet even in that case questions arose as between a distribution in specie and a pro rata division in which the aid of the Court had to be invoked.

Properties that were originally represented by sixty-seven companies are involved here in one way or another. It would be quite impossible within the limits of this article to convey a conception of the situation in all its manifold complications.

Suppose, however, that it were far more simple and that the parent company held in its treasury the shares of only five companies, each representing directly (which it does not) the ownership or control of the properties of a given industry—the cigarette business, the smoking-tobacco business, the plug-tobacco business, the cigar business, the foreign business, etc. It has been suggested that a distribution

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by the parent company of the shares of each of these companies among the stockholders of the parent company in the proportion of their holdings in the latter would answer the purposes of the judgment by analogy to the procedure in the Northern Securities case.

But that would accomplish nothing even if it could be done (which it could not), for here the chief industries were merged by ownership into one company (the present American Tobacco Company), so that they can no longer be divided into separate ownerships by stock distribution; but if this could be done the result would be to nominally separate five monopolies that are now held under one charter, so that they will be thereafter held by the same owners and in the same proportions under five different charters. That would only give each partner five pieces of paper instead of one to represent his participation. The Cigarette Company will still have the monopoly of the cigarette business to the same extent as before. Although it would no longer be owned by the same company as owned the snuff or tinfoil industry, its domination of the cigarette industry and over the consumer would be quite as great and as objectionable as before. The same is true of the others.

But the problem is still more complicated. We have not yet begun to encounter the real difficulties. There are approximately $100,000,000 of bonds outstanding, divided into two separate issues. They constitute a debt of the parent company. They are held by the investing public and are scattered all over the world. If the bondholders can be compelled to take their money before it is due, how can the company provide the funds? If the present controlling owners are to be forbidden to buy the properties representing a given industry as an entirety and are unwilling to buy certain dismembered parts, how is the money to be secured to pay the bonds; and until they are paid how can the company move in the direction of dismemberment?

Assuming that this difficulty is overcome by the co-operation of the defendants (and that is the only way in which it can be overcome), how are the cigarette, plug-tobacco, and smoking-tobacco properties and industries to be segregated? They are not separate companies. The properties are owned directly by the parent company through a consolidation effected in 1904 between the Continental, Consolidated, and the old American Tobacco Companies. There are no stocks

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of constituent companies to be distributed so far as those companies are concerned, and they constitute the bulk of the assets. They own factories, merchandise, brands, trademarks, etc., amounting to hundreds of millions of dollars, scattered all over the world.

Suppose the Court subdivides the properties into the three separate industries as they existed before the companies were consolidated, and directs that each be again organized under a separate charter and the new share capital deposited with the parent company and then distributed among its shareholders. What has then been accomplished? We have three monopolies, each owned by the same people and in the same proportions, operating separately, if you please, but in the same general interests and ownership as before. Are the stockholders in these now segregated companies to be permitted to exercise their right as stockholders to select their directors, or are they to be perpetually prevented from enjoying the prerogatives attaching to ownership? Shall we not have, in fact, the same real Boards of Directors in each of the ten companies or the same dominating factors behind "dummy" Boards so long as the companies continue to be owned by the same people?

This bare outline does not begin to summarize or to give a faint conception of the complexities inherent in the situation which the Court has undertaken to solve. We have not sought to deal (1) with the interest of the parent company in the foreign companies; (2) with the many constituent companies the shares of which are wholly or partially held by the parent company; (3) with the properties acquired directly by the present parent company since its organization in 1904; (4) with any attempt to segregate any one of the seven or more distinct industries that were consolidated with the present company either through direct ownership or stock control.

Suffice it to say that when we look into the problem of separating the constituent companies with a view of loosening the grip of the combination on any one of the industries the difficulties increase at every step.

With the genuine and hearty consent and co-operation of the defendants and of the general body of security-holders who would presumably follow them, but not otherwise, the thing becomes possible on the surface and to a very limited extent. But even then the measure of the possible relief

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would be negligible. It is idle to expect much of a judgment that must depend for its efficiency upon the aid of the defendants against whom it is directed.

What, then, is likely to happen? What must happen?

When the six or eight months allowed for solving this hopeless problem have passed, is the Court going to enforce the injunction contained in the decree against the company engaging in interstate trade without pointing out a way in which it can obey the judgment? If so, the decree will in itself effect a restraint of interstate trade far greater than that accomplished by the company, besides working a confiscation of vast property interests belonging to innocent investors who had every reason to believe from the attitude of the Government that they were embarking their money in a lawful enterprise.

The final outcome is as likely as not to be that the architects of this unlawful structure will be afforded the opportunity to reap as rich a harvest out of its attempted "disintegration" as they secured from its organization, if they are so disposed, of which I do not, however, for a moment believe them capable of taking advantage.

The thing attempted to be done by this judgment simply cannot be done. The Court will of necessity be forced to temporize with the situation. Something will doubtless be accomplished with the co-operation of the company toward avoiding the *appearance* of continued monopoly. A few of the plants in each branch of the industry, or perhaps one or two branches of the entire industry, may be put through the form of sale to outside interests or of distribution through the shares, but it will be at best a mere pretext. Courts are not constituted to deal adequately with questions of this character, and should not be asked to do so.

Instead of open ownership of the constitutent branches of the industry, we shall have "community of interest" with "gentlemen's agreements" wherever continued open ownership will not be tolerated; but we shall never again have actual competition between any of the properties that were constitutent parts of the parent company, no matter how much those concerned may now desire in all sincerity to comply with the judgment of the Court.

Assuming this to be true, even to a qualified extent, the question is presented:

Is there a remedy, and what is it?

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Our success in dealing with this great problem depends upon our recognizing that there is no complete remedy that will absolutely and completely rid us of the existing trusts and combinations. But there is much that may be done to correct, mitigate, and minimize the existing evil and prevent it from spreading into the industries that are not already controlled.

This, of course, involves first and foremost, but merely as a step preliminary to regulation and not as affording in and of itself a remedy, the enforced organization under the Federal law of every corporation engaged in interstate trade.

There is no reason for resorting to the temporizing measure of Federal license from doubt of the power of Congress to compel Federal incorporation. There must be complete and undivided Federal control, free from charter-tinkering and other interference by the States in order to render any scheme effective. We are unable to appreciate any force in the contention that Congress has not full power in the premises where the corporation is engaged in interstate trade. It is now axiomatic that the power to regulate commerce includes the power to control all the agencies and instrumentalities of commerce. Congress can at any time take unto itself the sole right to charter those engaged in interstate commerce.

It is time the power was taken from the States wherever possible in any event. In the fierce and undignified competition between them for the privilege of granting unrestricted license to prey upon their sister States to corporations which conduct no business within their borders and with which they have no concern, they have so relaxed the safeguards surrounding the issue of corporate securities and have granted such extraordinary and unjustified powers that it has long since become and is a national scandal. The stability of investments and the good name of the nation require the restriction and regulation of corporate powers and uniformity in the form of charters.

The prohibition of the holding company and the protection of the rights of minority stockholders through compulsory cumulative voting and other safeguards are among the urgent reforms that may be incidentally accomplished through a National Incorporation Law. Corporations should never have been allowed to own the stocks of other corpora-

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tions. It is only in recent years that any such improper privilege has been accorded them. It is an outcome of the charter trafficking referred to and has been the prolific source of innumerable swindles that are being constantly perpetrated upon minority stockholders.

It is to this abuse that we owe the existence of our most powerful trusts. Through it the pressure has been brought to bear on the helpless minority stockholder to part with his securities at the price fixed by the holder of the majority.

The character of the laws enacted in recent years in the various States creating short Statutes of Limitations in favor of corporate wrongdoers against their stockholders, and otherwise legislating stockholders out of remedies that would otherwise now be open to them for wrongs inflicted by promoters, and controlling interests in corporations makes it necessary that there be restriction and uniformity and greater caution in legislation affecting corporations.

The next step in the process of regulating this subject would be the creation of a Court or Commission similar in its powers over industrial corporations engaged in interstate trade to those of the Interstate Commerce Commission over railroads, giving to that tribunal the power to restrict prices, to permit and approve temporary trade agreements that would be enforcible in the courts similar to those that exist in Germany, Austria, and France.

The writer begs to repeat in this connection the recommendations suggested by him on this subject in the address above referred to on January 12th, 1911, as follows:

"*Rigid regulation under Federal Law is the only just solution.*

"It is possible and practicable and would do away with the grave existing evils which are constantly becoming more serious. As substantially all the combinations that affect the public welfare are engaged in Interstate or International Commerce within the enlarged definition of those terms under recent adjudications, there could be no serious question of the Constitutional right of the Federal Government to regulate and control their activities by a Federal license, if not by a Federal incorporation. Such regulation would, however, in order to be effective have to take a very much wider scope than has yet been suggested. . . .

"Such regulation must include as its most essential feature the power to prohibit by summary process all business oppression and other unfair methods and *particularly the exaction of excessive profits. This involves the power to limit the prices* that may be charged for any commodity beyond a fair profit. . . .

"The practical difficulties of regulating prices to the extent indicated are more imaginary than real.

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"*The proposition has never had a hearing.* Wherever any notice whatever has been taken of it the subject has been almost impatiently dismissed, although other countries whose judgment on economic questions is entitled to our respect have adopted the plan and find it practicable.

"The problem, though beset with difficulties, is one that we must solve. I therefore appeal for an approach to its discussion with an open mind.

"When we come to analyze the subject we find that the task is not nearly so complicated as that of framing a tariff, which must presumably take into account not only the cost of production in this country, but also such cost as compared with costs in one or more foreign countries. It is surely not nearly so complicated as will be the duty of the proposed Tariff Commission, which is expected to undertake a scientific study of and report upon the domestic and foreign costs of every known commodity."

It is not suggested that this system shall supersede the enforcement of remedies or penalties under the Anti-trust Law. They should, on the contrary, be merely complementary and supplementary to that Law. When a judgment is rendered against an existing offender it is proposed that it should be the province of the commission thus constituted to determine the manner in which the judgment shall be executed. If, after doing away with the violations, so far as this can be accomplished to the satisfaction of the commission, the offending corporation continues to be engaged in interstate commerce its future operations would be subject to the direction of this commission.

The effective cry that has been raised by the powerful advocates of so-called "business co-operation" and "community of interest," and the one argument that has been pressed upon the students of the economic problem, has been that the only alternative is ruinous competition, and that this is not to the interest of any country.

Of the two evils, ruinous competition is the less disastrous. If the alternative is between the two and the trusts are to be uncontrolled, the people will not hesitate to accept the former.

But is it true that this is the alternative? We venture to suggest that it is not. The Sherman Law may be enforced to prevent future combinations in direct restraint of trade, the courts may do what they can toward dissolving and curbing the existing violations, and we may still, through national regulation of the agencies of interstate trade, develop a system that will ameliorate the harshness of competition, permit of co-operation, and secure reasonable profits with full justice to the public if this subject can

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be taken out of the realm of partisan politics and dealt with on broad, economic, statesman-like lines.

This may be partly accomplished through pooling or trade agreements between the members of a given industry, regulating prices and production between them—subject to the approval of the national commission or tribunal to be created, somewhat after the general scheme of the German Potash Law of May, 1910.

It would not be necessary to amend or take away from the Sherman Law in order to reach this result by independent legislation. The law creating the commission would provide that no agreement or combination in direct restraint of interstate trade should be sanctioned, and that all agreements thus permitted would be held to be in reasonable restriction of competition and as not in direct restraint of trade.

The commission would necessarily determine the extent to which production might be curtailed and the maximum prices permitted to be charged, which would be subject to change from time to time in its discretion. Any corporation desiring to acquire the business of a competitor would be required to secure the permission of the commission, which would be granted where it appeared that there were legitimate business reasons to support the application and that no direct restraint of trade was involved.

In like manner every contract accompanying a sale by an individual or corporation engaged in interstate commerce of the good-will of his business which restricted him from engaging in competing business should receive the approval of the commission in order to be enforcible.

There would be many great and manifest advantages to the public in sanctioning these kartels, or trade arrangements; among others (1) the permission thus given would involve each owner retaining his own property; (2) it would destroy one of the incentives and the only plausible pretext for trusts and consolidations in the form of a single ownership; (3) inflated stock issues, oppression of competitors, closing of factories, and all the greatest of the evils incident to concentrated ownership in the form of a trust or consolidation would be avoided by permitting these agreements. There would no longer be an excuse for their existence. Such a system would also do away with the most cruel of all kinds of competition—that which is resorted to for the purpose of forcing the weaker competitor to choose between

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facing ruin and selling his property to his stronger rival on the latter's terms.

Under this arrangement the stronger man would know that he could not acquire his weaker competitor except with the assent of the commission, and that this would not be accorded if the situation were brought about by unlawful or oppressive methods.

None of the oppressive expedients to crush competition that are resorted to where the former competing interests have been firmly and indissolubly banded together would characterize the operation of these pools or trade agreements for the plain reason that the interests of the parties are not permanent or identical. They are still competitors, subject to certain restricted interests in common. Each party to the arrangement operates his own factory at his own risk and for his own benefit. The agreement is limited as to time. They may resume open and unrestricted competition upon the termination of the agreement. They cannot afford to exchange trade secrets or to go into co-operative schemes to cripple outside competition, even if they were permitted to do so. On all these points their methods and operations would be in marked contrast with those of trusts and consolidations where there is a single, permanent ownership with all the concentrated power and unity of interest involved.

The proposed remedy may be summarized as follows:

(1) The compulsory Federal incorporation of all corporations engaged in trade or commerce between the States or with foreign countries.

(2) The creation of a commission similar in its powers over business corporations to those now possessed by the Interstate Commerce Commission over railroads and the utilization in that connection, so far as possible, of the present Commerce Court.

(3) That this commission pass upon the right of every applicant for a Federal charter, and that where violations of law exist which would prevent the granting of such a charter such violations should be first removed.

(4) That the commission have power to authorize and approve agreements that will be enforcible in the courts in the form of pools, kartels, or syndicate arrangements for regulating competition in any industry, provided such agreement does not have the effect of unreasonably restricting

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competition or of operating as a direct restraint of trade; that in that connection it be empowered from time to time to determine the extent to which prices may be fixed or production restricted, and particularly to prevent any interference by the parties to the agreement with outside competition.

(5) That the Sherman Anti-trust Law be enforced against existing offenders, and that the execution of the details of the judgment be intrusted to the commission, subject wherever necessary by reason of constitutional limitations to the approval by the Court and the adoption by the latter of the findings of the commission.

(6) That (*a*) the criminal section of the Anti-trust Law, (*b*) the provisions allowing an injunction against the creation or continuance of violations, and (*c*) the provisions for the summary seizure and confiscation under Section 6 of all property in interstate transit of any corporation operating in violation of the statute be rigidly enforced.

With such a programme and an administration in sympathy with it, and with the energy and ability necessary to carry it out, every existing violation of the law would soon be corrected so far as that would be possible, and we would have a consistent, workable plan instead of the present intolerable condition; floundering and insincere on the part of the administration and chaotic from the point of view of the business community.

It is hoped that the pending agitation will continue with all the light that can be had from every direction until the necessary reforms are embodied in constructive legislation that will remove this question from the domain of party strife. Its early solution is too essential to the general welfare to be made the football of political contentions and ambitions.

The Congressional investigations now under way will assist in educating the people to an understanding of the peril and urgency of the situation. The testimony taken at the future sessions of the Committee of Inquiry into the Steel Corporation (which has not yet scratched the surface and from which it would appear that the investigators are thus far uninformed as to the important facts concerning the organization of the company) has already keenly aroused public curiosity. The huge sums involved and the dramatic human interest attaching to the chief actors in the boldest

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and most gigantic financial and industrial operation that the world has ever known are bound to hold public attention.

It is important that the investigation shall be thorough and that the reports of the testimony as distributed shall be comprehensive and free from bias, color and influence (no easy task in these days). The Committee should not be compelled to rely upon the accountants and experts of the corporation. It should be furnished its own experts and accountants and all the assistants necessary for an exhaustive inquiry.

The uniform record of the corporation from the beginning has been one of entire frankness and of the fullest publicity in dealing both with the public and with its shareholders. In that respect its conduct has been a wholesome object-lesson to the trusts and corporations that had been operating in the dark as blind pools and had been for years permitted to do so, to the amazement of every other civilized country.

The example of the Steel Company more than any other factor forced the abandonment of these "dark-lantern" methods of finance. For that service the country owes it a great debt of gratitude, for its power is so great that no such concession, however just or necessary, could have been wrested from it by the Law; whilst the Stock Exchange, which is responsible for its securities, has ever been a willing servant of the interests that dominate the trust.

Judging, therefore, by the praiseworthy past record of the Steel Company, the Committee is justified in expecting every aid. We should thus learn of the community and identity of interest and control between the Company and its dominating owners and Directors on the one hand and (1) the Railroads of the Country; (2) the great Banks, Trust Companies, and Life Insurance Companies, with their billions of dollars of other people's money, and all that this means; (3) the inexhaustible reserves of iron ores that the Company owns, and which together with its railroad and financial connections places many of the so-called "independents" at its mercy.

In the last analysis it will be found that the peril to the country from these vast accumulations of wealth and power has been greatly underestimated.

Without stopping to criticise the way in which this new-found power, so fearful in its potentialities for evil and oppression that the brain fairly reels at the effort to realize it, has been or is being exercised, we are confronted with the

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problem of how to encompass its destruction and to prevent its recurrence. It may be conceded for the sake of argument that the power now happily rests in the safest possible hands with the highest sense of responsibility to the State—a benign, well-meaning, public-spirited monarch of the financial destinies of the Nation, if you please, although there are conflicting opinions as to his disinterestedness and public spirit.

But a monarch none the less, and not even a constitutional one at that, for he confessedly has all the power of a despot to make or destroy. How long will we patiently contemplate or tolerate the possibilities of such a condition of vassalage, no matter what may be the present realities? No one can say how soon the power may drift into more ambitious and less scrupulous hands. It is incredible and intolerable that it should rest with any one man or group of men by a word to make and unmake men who have no relations with them, to close banks and trust companies, precipitate and avert and compose panics in the financial world, control the security and commodity markets, dominate the railroad and industrial world so that by a word the channels of credit are dried up and shrivelled as if by magic against any individual or enterprise whose property he may covet or that it is his will to destroy.

The picture is not exaggerated. If anything it is understated, for there is a brotherhood of self-interest between this modern King of finance and all that serve under him in the same cause that welds them together as one, regardless of personal ambitions, jealousies, and enmities.

Whenever in the past our country has faced a great crisis the man to meet it has been found among us. Let us hope that we shall now find the constructive statesman and patriot to rid us of this fatal blight and put in its place a healthy industrial and financial freedom under which we may live and prosper. We need him now. His first work will be to lead us safely out of the clutches of the Trusts that with our aid and encouragement have been fastened upon us and have kept us all these years in their grip. That accomplishment will be the best and highest test of his statesmanship. The rest will be easy.

SAMUEL UNTERMYER.

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THE POETRY OF THOMAS HARDY

BY ALFRED NOYES

THOSE who have read the novels of Thomas Hardy might —especially such novels as *The Return of the Native*—have always known that he was a great poet, without regard to the medium in which the gods or the "Immanent Will" might lead him to work. Those who have had the privilege of hearing him speak of his aims know that poetry, moving properly in meter (just as the Universe with its tides and stars and human pulses moves in meter), lies nearest to his heart. And those who are really abreast of the achievements in poetry during the last fifty years are also aware that Mr. Hardy's poem, "The Darkling Thrush," is a lyric of rugged strength, that peculiar strength which comes from understatement and the sense of something in reserve; a lyric of such pathos and beauty as can be compared with the best that has ever been done in our great lyrical language; and that is to say one of the finest lyrics in the world. From the first lines, "I leant upon a coppice gate when Frost was specter gray," and the suggestive imagery wherewith the lovely landscape, with its tangled vine stems scoring the sky "like strings from broken lyres," to the restrained and intense rapture of the close, the poem bears upon it the stamp of a truth and sincerity beyond praise.

"The land's sharp features seemed to be
The Century's corpse outleant,
His crypt the cloudy canopy,
The wind his death-lament.
The ancient pulse of germ and birth
Was shrunken hard and dry,
And every spirit upon earth
Seemed fervourless as I.

"At once a voice rang forth among
The bleak twigs overhead
In a full-hearted even-song
Of joy illimited;

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An aged thrush, frail, gaunt, and small,
In blast-beruffled plume,
Had chosen thus to fling his soul
Upon the growing gloom.

"So little cause for carolings
Of such ecstatic sound
Was written on terrestrial things
Afar or nigh around,
That I could think there trembled through
His happy good-night air
Some blessed hope whereof he knew
And I was unaware."

The quaint human touch—so characteristic of this poet—whereby "winter's dregs made desolate the weakening eye of day" leads on with cumulative effect to the broader symbolism of the first stanza quoted above, in which the landscape represents the vast intellectual and spiritual period that closed with the nineteenth century. But there is none of that overemphasis of the twofold significance with which too many modern poets are apt to falsify both the symbol and the thing symbolized. There is just that touch — and no more — which gives the poem solidity and depth; and when it reaches the ecstatic climax of the song of the thrush justifies the ecstasy with thoughts beyond the reaches of our souls. By sinking the century into the landscape the poet is enabled to bring a fleeting glimpse of heaven before us in the song of the bird, and the whole poem is flooded with "the light that never was on sea or land." It is a lyric that, read once, may be forgotten. Read three times, it will haunt the reader's memory as long as pain and death retain any meaning for him. For those, too, who had come to regard the mind of Thomas Hardy as something like the wintry landscape of his poem the sudden rapturous song of the "aged thrush, frail, gaunt, and small, in blast-beruffled plume," must seem almost to symbolize the divinest quality of that mind, the quality which came to many as a similarly sudden surprise when our profoundest pessimist betook himself to poetry pure and simple. In that unexpected note which trembles also with some strange hope through the "Chorus of the Pities" at the end of *The Dynasts,* that epic of gloom and blood and world anguish, is there not something far nearer to the fount of tears than any poet less sincere could give us? We are used to so much poetic tinsel nowadays that one

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may clutch with something like passion at the hem of the gray garment of Hope which Mr. Hardy displays passing through that final dream of his titanic drama.

When the first two parts of *The Dynasts* appeared there was a general disposition among critics to "hum" and "ha." "The furtive yelp of the masked and writhing poeticule"—as another Victorian poet exuberantly described it—did not fail, however, to testify to the real greatness of the strange intruder. The method of these critics was the usual one—an ancient method and a very rampant one in the eighteenth century, as the protests of Coleridge testify—namely, that of quoting a few detached lines like,

"That dignified and pensive gentleman,"

and plaintively inquiring if this were poetry, and if Mr. Hardy had not better return to his novels; for Mr. X and Mr. Y could both of them show him several tricks of improving verse so blank. These critics—and they are always with us—had not only forgotten their Shakespeare and his methods; they had also—and in this case it is more important—forgotten their Goethe; and they were displaying complete ignorance of the first principles of criticism. It may not be out of place here to comment on this matter, for it is one of the most widely misunderstood points in connection with the right appreciation of poetry.

It is difficult to fathom the stupidity which can assume that a writer like Hardy in a line like,

"That dignified and pensive gentleman,"

is really aiming at the beauty of the "Ode on a Grecian Urn." Over and over again Hardy has proved his sense of beauty. But even if he had not, he is—beyond all dispute—one of the foremost men of letters of our time. Yet critic after critic could calmly assume that the line quoted above was the result of a deliberate effort by this brilliant man of letters to write a single line of independent metrical beauty such as,

"In cradle of the rude imperious surge."

There is surely not an educated man in the world who could not better the attempt if that were really so, for in every detail the line looks like a deliberate attempt to write as ludicrously prosaic a verse as FitzGerald's,

"A Mr. Williamson, a clergyman."

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There is not an educated foreigner who, with only a smattering of English and the help of a dictionary, could not better it. And yet such an assumption is, over and over again, the fundamental assumption of a certain kind of English criticism. It is as if an amateur chess-player playing with Paul Morphy were to assume that his opponent's first unusual move was a disastrous mistake, and without examination of the general scheme of the game were thereupon to announce "mate" in three moves. Self-stultification could not be more complete. Yet Shakespeare—and Hamlet in his remarks to Polonius would surely give this method of criticism some food for thought—is almost the only great poet who has escaped this folly, and even he has not escaped scatheless. It is not only the obscure critic who resorts to it, but it is even the critic of eminence—as Christopher North with his "This will never do" to Wordsworth's magnificent "Cathedral of Song"; and it manifests itself in the realms of all the other arts. Whistler, without reference to his aims, was assumed to be failing to attain what any boy with his first paint-box might attain with ease.

The publication of the third part of *The Dynasts,* however, brought the amateur chess-players of criticism to a graver frame of mind with regard to the soundness of their own position, and the work has begun to take its place as one of the greatest poems of modern times. It has, though on a much larger scale, all the great qualities of Mr. Hardy's novels—their structural perfection, as of organic architecture, their scientific precision and lucidity, their biting irony, their symbolism, and their extraordinary power of conveying a vast sense of movement, whether of heather on a lonely wind-swept moor, of armies, or of the starry heavens. Any one reading it rightly will secure a vast panoramic view of the whole period of the Napoleonic wars, with all the ramifications of its politics, the private intrigues of its statesmen, the public debates, the fashionable assemblies, and the life of people in country districts where the tidal world movements broke only in ripples. Never before in literature has so vast a field been presented so simply and completely and originally. For the work is so marvelously perfect in structure, the parts are all so finely related to the whole, that one seems to survey the whole simultaneously. But the work must be read consecutively or the wonder of it will elude the reader.

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For instance, if one reads, at the end of the first Act of Part III, the following dialogue between Napoleon (who has just returned from his Moscow disaster) and Marie Louise one may think the verse very blank indeed:

Napoleon:

"I intend,
Also to gild the dome of the Invalides
In best gold leaf, and on a novel pattern."

Marie Louise:

"To gild the dome, dear? Why?"

Napoleon:

"To give them things
To think about. . . . So they'll forget
The woes of Moscow."

And when the scene is closed by the announcement of supper the desultory reader may suffer disappointment. Yet if any properly qualified reader takes the whole Act as it stands, he will begin to think it only possible to a poet who combines in himself the peculiar powers of a Dante, a Goethe, and a Voltaire—with, perhaps, a dash of Gibbon—but with all these powers in perfect unity and harmony. For the scene just quoted follows immediately on another, of merciless winter in Lithuania, where Napoleon's soldiers are told that their leader has deserted them.

"It is growing dark, though nothing distinguishes where the sun sets. There is no sound except that of a shuffling of feet in the direction of a bivouac. Here are gathered tattered men like skeletons. Their noses and ears are frost-bitten, and pus is oozing from their eyes. These stricken shades, in a limbo of gloom, are among the last survivors of the French army. . . . One squad, plowing through snow above their knees and with icicles dangling from their hair that clink like glass lustres as they walk, . . . bring back boughs and contrive to light a fire. With swords they cut rashers from a dead horse, using gunpowder for salt to eat them with. Two others return with a dead rat and some candle-ends. . . .

A straggler enters.

First Soldier (dazed):

"What—gone, do you say? Gone?"

A scene of despairing madness follows till they are exhausted, and once more crouch hopelessly around the fire.

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In the morning the Russians arrive and find them still sitting there.

Kutuzof:

"Go, stir them up. We slay not sleeping men."

Russian Officer:

"Prince, here's a curious picture. They are dead."

Kutuzof (with indifference):

"Oh, naturally. After the snow was down
I marked a sharpening of the air last night.
We shall be stumbling on such frost-baked meats
Most of the way to Wilna."

Officer (examining the bodies):

"They all sit
As they were living still, but stiff as horns;
And even the color has not left their cheeks,
Whereon the tears remain in strings of ice.
It was a marvel they were not consumed:
Their clothes are cindered by the fire in front,
While at their back the frost has caked them hard."

(Exeunt Kutuzof, his staff, and the detachment of horse in the direction of Wilna; and with the advance of day the snow resumes its fall, slowly burying the dead bivouackers.)

That scene surely throws a new light on Napoleon's supper, and transfuses the frivolous verses of his conversation with a vitriolic irony. The passage of verse italicised above is in its burning depth of bitterness only to be compared with certain passages of Dante's "Inferno." The verse of Hardy is not to be estimated by "quirks and turns" within the line. It is altogether a larger matter. "Prince, here's a curious picture," taken by itself might not rise to the standard of a minor critic. Taken as the utterances of the characters in "Hamlet" are taken, as notes in a great symphony that can only be fully realized in the organic whole, they grip the heart and intellect with their grim conviction.

From beginning to end the poetry of Thomas Hardy is the very voice of pessimism, but it is the pessimism of Shakespeare's tragedies, a pessimism so profound that it goes down to the depths where construction begins. The motto of it might be, "Life's a poor player!" With the Book of Ecclesiastes it would cry, "All is vanity!" and with Job it would sometimes be tempted to curse the Omnipotent Dramatist and die; but what it really does is to find the connections, links, harmonies, ironic harmonies, per-

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haps, but still harmonies, between one detail of the world and another. For that is the whole business of art. It finds meanings, bitter meanings apparently and primarily, but still meanings, in the meaningless. It finds in the chaotic a little order, rhythm, and music; and this, so far as it goes, is—as the very name of poetry implies—not destructive, but constructive. Let the pessimist give us the stage and the poor players — Time's Laughing-Stocks — and the soul of man will flash to the Dramatist. To put the matter in its simplest form, we must have All or Nothing for an answer when we ask what lies behind the scenes of the Universe. The poetry of Thomas Hardy does not give us "Nothing" as the answer. Let us have two phrases, as in merely the title of his book, *Time's Laughing-Stocks,* phrases whose connection is based on an artistic, even if ironic, harmony; and we have all the basis for a constructive philosophy that the wildest optimist can desire. For there is then no limit to their logical consequences, no limit to the modulations of the intellectual music we can build upon them, in every direction, outward, downward, and upward. They are, necessarily, logically, fragments of an infinite symphony ranging from hell to heaven. They are organic. The Spirit of Life is in them with its infinite possibilities; and where that Spirit possesses a work of art the work, however small, is like the five loaves and two small fishes of the miracle. A multitude may be fed by it, and we may fill many baskets with the fragments that are left over. Destructive poetry is a contradiction in terms. The tragedies of Shakespeare are not gospels of annihilation emitted in a fundamentally meaningless harmony from the baseless brain of an Accident from Nowhere. The content and import of a work of art are not to be weighed in the same way as those of a philosophic system or a work of science. The cry of Macbeth, "Out! out! brief candle!" is not to be taken as a cold scientific statement of the meaninglessness of human life. Our fathers understood this when they set the Book of Ecclesiastes before their passionate Gospel. When Shakespeare wrote, "Life's a poor player that struts and frets his hour upon the stage," the words contained more than a negation. They have passion, pain, and, most important of all, they have profound inner harmonies. Tragedy is not merely negation. It is a sloughing off of the Temporal for the Eternal. What infinities of respiration are involved in those two

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words—"his hour"! There is a positive, a constructive, element in such poetry which goes to swell the cry of Calvary, "Why hast Thou forsaken Me?"

There is no sublimity in the death of an insubstantial toad under an accidental and nonsensical harrow which arose from Nowhere out of Nothing. But there is sublimity in the dying cry of Hamlet to the friend who would fain have followed him, "Absent thee from felicity awhile"—a cry which, in its implied idea of sacrifice, contains almost the whole fundamental dogma of Christianity. Well might that friend of Hamlet be caught up by the surrounding orchestra of the universe at that moment, and continue the great symphonic movement with his own faltering voice over the dead body: "Good-night, sweet Prince! And flights of angels sing thee to thy rest."

In the poetry of Thomas Hardy, as in the grave-diggers' scene in "Hamlet," we are shown the skull beneath the face of beauty and reminded of it with remorseless power. But the same may be said of the Hebrew prophets. If Hardy sees men as insects crawling over their little ball of dust, he is only able to do this because, as a poet, he himself can soar high enough. It is the soul of one of these same men that embraces so vast a field. It is the soul of one of these same men which knocks thus at the doors of Eternity.

We have spoken above of the way in which he takes two or three details, disconnected to the merely philosophic or, at any rate, to the merely scientific eye, and establishes an artistic harmony, a connection, even if ironic, between them. A good example of this is the remarkable poem entitled "The Two Rosalinds." It is the story of a man who enters a theater where—forty years ago—he had seen a beautiful Rosalind. He enters, wishing to see the old vision, but the new Rosalind disappoints him. As he comes out he is confronted by a miserable old hag hawking the words of the play: "So you don't like her, sir?" said she. "Ah, I was once that Rosalind! Now, some forty years ago I used to say, 'Come, woo me, woo me!'" and she struck the attitude:

> "Clear as noon
> My Rosalind was here. . . . Thereon the band withinside lightly
> Beat up a merry tune."

Now the connection between that merry tune and the ghastly discovery, together with all the other little ironic harmonies that are so deliberately drawn out of the situa-

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tion, refuses to give up its secret to science. But it is obvious that it is full of the deepest significance to the poet, a significance that would only be fully rendered by a symphony that should sum up the whole universe. It is only the resultant voice of the whole that can give us the whole truth. So that even here we may think that there trembles, through all that bitterness, some "blessed hope" whereof we are unaware. For great art does not need to be "aware" of these things any more than it needs a definite "moral" to its stories. The poetry of Thomas Hardy is meat for the strong; but so is the Book of Ecclesiastes, and the "pessimism" of both is so profound that it postulates without affirming a passionate gospel. For there is one reality that they leave us—the grim reality of infinite passion, infinite pain; and infinite compassion, too. The starving thrush of *Time's Laughing-Stocks* demands, like the caged red-breast of Blake, an enraged heaven. This poet strikes notes—pessimist though he may even think himself to be—which demand only one answer from the symphonic whole—"not one of these shall fall to the ground without your Father." Negation may be swept aside at once. The superficial pessimist is necessarily wrong, for he says that last word which no man can say or can ever say. Amid all our talk of "progress," mankind cannot, without self-stultification, acquiesce in a theory of a universe based on Nothing and ending in Nothing, or even in one which involves—at any stage, no matter how distant in time—the proceeding of the greater from the less, of the conscious and loving from the less than conscious. Logically, Hardy realizes this, and speaks here and there of a Something that is more than "conscious" and above "love"; but the human imagination is bound by its own limits, and in refusing to allow its own highest attributes to the Power behind the Universe it necessarily runs the risk of allowing merely mechanical attributes. This is the one flaw in the philosophical system of Thomas Hardy considered apart from its artistic import. In refusing to lessen the Highest by a lofty yet humble anthropomorphism he too often seems to set The Eternal lower than the brutes by reason of its mechanical aloofness; and lower the things mechanical by reason of its brutality. But this flaw is merely in his philosophical armor. It does not affect the artistic values of his work of which he himself may philosophically be "un-

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aware." He is to be thanked for bringing our optimism face to face with those grim realities which the religion of the future (and if mankind be in earnest about itself some religion it needs now more than ever, and needs passionately) will once more have to embrace. "In poetry," said Matthew Arnold, "our race will come to find an ever surer and surer stay," for the inevitable answer of poetry to the question of All or Nothing is—All.

Great art establishes for us the hidden harmonies of the universe and reveals our membership of the whole divine body, linking details which science cannot ever get into the same field of vision, linking the shriveled moth with the wheeling stars and the passion of the Godhead. There is no gap in the scheme of things for the great artist in his infinite field any more than for the scientist in his finite field. The poet cannot pluck a flower "without troubling of a star." There is no severance, nothing but unity. If the Omnipotent Creator dies into immortal life with the meanest of His dying creatures a fuller light is thrown upon the poem of "The Darkling Thrush," a more triumphant passion throbs with a deeper significance in the throat of Blake's caged bird. Without it, what a futile mockery it is — to be "unaware" of something that is non-existent! But that fuller light of vision is not a different or contradictory light. It is only for these poems the logical completion of their own music, which demanded that fulfilment, led up to it, step by step, with mathematical precision, and can set no limit to its progress and its hope, and can never say "the last word." But to arrive at that climbing and building music, to arrive at the first postulate on which that music is based, we have to clear away the cant and falsehood and all the colored lights of illusion which perplex the modern artist. We have to avoid mistaking fen-fires for the stars. This poet of pessimism makes short work of illusions, and, as we have said, goes to the depths where construction—unless the impossible last word has been said —begins.

ALFRED NOYES.

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IS JUDAISM NECESSARY TO-DAY?

BY ABRAM S. ISAACS.

A FEW months ago two friends were discussing the subject of the various religions; the one a Presbyterian, a lawyer by profession; the other an Israelite, a physician of repute. In the course of the conversation the lawyer was asked his opinion of Judaism. "To tell you frankly," the reply came, without any hesitation, "I regard it as entirely unnecessary to-day. The world can get along without it. Its work ended long ago. All that is good and useful in it has been utilized by other creeds." When he was further questioned to account for its survival he rejoined: "Why, it is purely an arrested development, interesting as an archæological study, that is all. Of course I admit that I have met very few Jews and have read little, if anything, about their religion or history."

There is nothing exceptional or exaggerated in this statement. The *Ilium fuit* argument applied to Judaism, the view that it is essentially an anachronism in the currents of these later centuries and in an atmosphere of Yankee notions, is by no means rare. If it is not more frequently expressed, possibly out of motives of delicacy, it is held none the less tenaciously. Judaism's work is closed, so it is asserted, sagely; it has no further *raison d'être.* If now and then a Jew does appear on the world's stage and competes for recognition he is as superfluous as would be an old-time Etruscan. He can tell us nothing new. And as for his religion, his rites, customs, ceremonies, his doctrines and literature, why, that is merely for the museum of antiquities along with other theological pterodactyls. This is not the Mesozoic age—who wishes to breathe again the Judean atmosphere?

That Judaism should be regarded as unnecessary is due

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mainly to two special causes. The first springs from the density of popular ignorance. When Marlowe pictured Barabbas as poisoner of wells, he was merely giving the popular idea of a Jew. When Shakespeare symbolized in Shylock the spirit of revenge as the Jew's chief characteristic he was also presenting the current notion—any figure like Nathan the Wise or Daniel Deronda, if at all thinkable in that era, would have been hooted from the stage. With the ages, naturally, there has been a gratifying improvement in the popular conception, despite the cheap vaudeville and the vulgar comic weekly; but how absurd and untrue the caricature that still prevails! How can it be otherwise? Greece and Rome find a conspicuous place in the school text-book—the history of the Jew is limited to a few pages, ending with the destruction of Jerusalem by Titus, when two thousand years of wandering through the world's *Via dolorosa,* a record thrilling, eventful, of far-reaching consequences, receives absolutely no mention. In standard works on education Judaism is considered a negligible quantity, although long before the medieval schoolmasters the rabbis were teachers of what in large measure might be called the new education. In pretentious volumes on the history of religions Judaism, if discussed at all, is restricted practically to the era of the Old Testament, all later developments being omitted as without historic significance. In a recently issued work, devoted to what has been done in the United States for the year, all sects and creeds being duly chronicled, no provision was made in the schedule for American Judaism, with two million adherents, so unnecessary did it appear.

When the scholar, the theologian, the historian, who certainly should foster the broadest ideals, are satisfied with partial knowledge and unjust discrimination, what wonder that the people continue in their ignorance. The average pulpit, the teacher of the multitude, presents the Jew without flesh and blood, a mere ghostly shadow of the centuries between the Testaments, an unsubstantial echo of a far-away epoch. That popular ignorance is the favorite soil for antipathies, social and religious, cannot be disputed. Hence when the scholar underrates or ignores Judaism as a living factor in the world's betterment, a force to be reckoned with in the history of civilization, he is but forging a link in the chain of prejudice, with its hateful consequences. Happily,

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there are scholars not a few who rise above such colossal ignorance and are proud to exclaim with Barthelemy Saint Hilaire in Senator Millaud's "*Petites Pages*," "Never conquered, always erect, as courageous as it is resigned, Israel shines in the world like a torch throughout the ages."

The second contributing factor to present-day ignorance of Judaism has been the Jew himself. While not primarily responsible for the medieval Ghetto into which he was cast like a hunted criminal, he is at fault if in lands that assure him civil and religious freedom he retains a trace of the Ghetto spirit, any aloofness or exclusiveness, any peculiarity or attitude that may single him out as an alien for which his religion and not his personal idiosyncrasies is blamed. It is possible, however, to be too exacting in this connection—it takes time to abandon habits bred by centuries of oppression. The truly representative Israelite knows how to discriminate between essentials and non-essentials in his creed and practise, and, save in the synagogue, is indistinguishable in character, motive, appearance, manner from his neighbor who goes to church. A man or woman of that type enters zealously into the life of the general community, promotes the public welfare, is a useful citizen of the commonwealth, whose highest interest he makes his own. If he strives to advance art, music, science, education, benevolence, no question of creed is considered. His Americanism, his patriotic fervor, is a vital part of his religion. Men like Haym Solomon, who sacrificed his fortune for the American cause in the darkest period of the Revolution with a reckless disregard for collateral which no financier of our time would dream of imitating; or Judah Touro, who fought at New Orleans under Jackson and devoted his wealth in public and private beneficence; or Julius Hallgarten, whose large bequests went to education without regard to race, creed and color, not to allude to the rapidly increasing list of men and women who identify themselves with public movements without, however, neglecting the appealing cry of their needy brethren in the flesh — such examples are shining texts which rob popular prejudice of much of its sting. But many have still to discriminate between substance and shadow, reality and counterfeit, in their ancestral religion and its traditions, which have become so closely intermingled that more than ordinary heroism is required to cut the knot. Until they have learned the lesson, and have aban-

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doned their voluntary Ghetto, with its narrowness and conceit, they have largely to blame themselves for such ignorance and antipathy as are encountered.

Now waiving further consideration of the two factors that are mainly responsible for current notions as to Judaism, let us briefly consider what are the qualities in a religion which make it necessary to-day. Let us ignore for the moment theological claims and assumptions that are to be met in the history of all creeds and which are possibly the secret of their weakness as well as their strength. Let us give precedence rather to the positive and practical elements.

A religion must first be rational—it must appeal to the reason and not stultify human intelligence as the fundamental basis of belief. It must concern itself primarily with the lives and welfare of its adherents on earth and not dwell needlessly on the delights and terrors of another world, angelic raptures, demonic frenzies. Its ethical strength must be without a flaw—there must be no dallying with the moral principle for self-aggrandizement. Its ultimate aim must be human betterment, not the extirpation of all who hold other views. Macaulay could not have crystallized the matter more tersely when he wrote that the doctrine of bigotry is simply this: "I am in the right and you are in the wrong. When you are the stronger you agree to tolerate me, for it is your duty to tolerate truth. But when I am the stronger I shall persecute you, for it is my duty to persecute error." A religion, finally, must make its followers better, more helpful, more blessed, so that its influence shall be recognized more and more for good.

Before we ask, How does Judaism meet this definition of a necessary religion (within present limitations it is impossible to enter more thoroughly into the subject), let us put the question, What is Judaism? That is the crux of the discussion. It is not the religion of the Patriarchs, the Pentateuch, the Prophets only. It is ethical monotheism colored by the history of the Jewish people and is a development ever continuing as that people or race or religious body survives from age to age, from clime to clime. It is not restricted to the Old Testament and the surroundings of Palestine. That environment marked only its point of origin. As the real history of the Jew may be said to have begun with the Roman's capture of Jerusalem, when he

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exchanged a strip of soil for the universe, so his religion, which is not Mosaism or Rabbinism, but Judaism, attained its greatest breadth when the sacrificial era closed, prayer became the substitute for burnt offering, and school and synagogue spread in every land. Ideals change, customs vary, opinions clash, and out of this everlasting conflict Judaism attains new life and vigor. That is one secret of its survival. The very legalism which is such a constituent part of the Jewish religion and which is usually criticised as repressive and narrowing became a balance-wheel for character and conduct.

Naturally, this view will be sharply challenged by those who have made Judaism a convenient dummy or veritable taboo. There are many who conscientiously limit the religion of the Jew to the Old Testament. The modern Jew, they assert, is a degenerate, his religion a counterfeit, if not a danger to the children of light. The testimony of history, the story of rabbinical development, with the wider dispersion after the Roman triumph, the influence of the Talmud, the spread of the schools East and West, the tremendous upheaval with the discovery of America, the Reformation, the French Revolution; these have given new form and color to the Jew's thought and made the Biblical era almost like his kindergarten. Such a view of the situation is utterly ignored by those who have long preached Judaism's funeral sermon and cannot understand why its obsequies are indefinitely postponed. Everything is ready but the corpse.

Bearing in mind, then, this juster conception of Judaism as embracing every era in its history, past and present, how far does it meet our definition of a necessary religion?

Judaism is rational, for its fundamental doctrines are in accord with human intelligence. These are the Unity of God and the unity of mankind, which forms a common brotherhood, even as the Deity is the Father of all races and creeds. Its ideal is universal peace and righteousness, to be brought about by the gradual diffusion of justice, kindness and humility. Its aim is the attainment of the perfect life among its adherents, which its rites and ceremonies have in view and to which they are subordinated. Its ethics are unsurpassed for breadth and beauty—they have become so absorbed and utilized that the world fails to recognize the debt. It plants itself on earth and speculates little about the next world, preferring to make a heaven of earth instead

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of transplanting the passions and weaknesses of earth to heaven. Its highest conception of the future is of all creeds and nations acknowledging one God and worshipping as brethren. It seeks no proselytes: all who lead pious lives, whatever their creed or race, inherit eternal bliss is its traditional saying. And it has held to this gracious optimism despite two thousand years of travail. "Thou shalt love thy neighbor as thyself," "Have we not all One Father?" are its golden texts for all time.

Undoubtedly one clew, however slight, to the opinion that Judaism is unnecessary, is found in its disinclination to proselytize. One is accustomed to associate some system of propaganda, an active, aggressive tendency with a living faith. Apparently the objection that Max Müller decades ago uttered against Judaism as being inert without the missionary spirit carries a certain amount of weight. Hence as it makes no outside stir, is concerned directly with its own adherents and gives no thought to the world's salvation as demanding its interference, it is likely to be regarded as less necessary than a more militant organization. But there is a twofold reason for this apathy. In the first place, the Jews have never had the power to make propaganda even if they desired and the synagogue polity favored such a course. It would have been suicidal, if one considers the conditions under which they have existed. Then, too, the Jew, realizing the beauty and excellence in the life and aspiration of the non-Jew, feels that the offshoots of Judaism, what the Germans call its "daughter religions," are doing God's work. As a matter of history, however, it is false to assume that Judaism has always been a passionless block—it has numbered illustrious converts; but these have come without conscious effort, even in Roman days when Juvenal grew sarcastic at the Jew's expense and the synagogue was visited by men and women of noble rank. Why, however, should it compass sea and earth to make a proselyte? What was to be gained? Mere numerical strength was of little consequence to a people whose consoling hope was the saving remnant. And as for power, dominion, wealth, had not the prophet proclaimed of old—"not by might, but by my spirit"?

It is, however, the survival of Judaism, with its essential belief still powerful, its hold on its adherents practically unchanged, its ethical platform broad and inspiring; in other

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words, its vitality undimmed, that proves its right to be called a religion necessary to-day. When Tennyson wrote,

> "From scarped cliff and quarried stone
> She cries, 'A thousand types are gone:
> I care for nothing, all shall go,'"

he did not think of any possible exception to the law of destruction that overwhelms nations and creeds as well as cliff and stone. May not Judaism, without any undue boastfulness, claim to be such an exception? A religion that has survived so much cannot be unnecessary. A vitality that has stood persecution-proof for ages must have a further part to play. If the thought of Emerson be true, "Every lash inflicted is a tongue of flame, every prison a more illustrious abode, every burnt book or house enlightens the world," the practical crucifixion of an entire race for nearly twenty centuries because it refused to be disloyal to its flag is the most powerful proof that it must possess a message and a warning necessary in some form for mankind to-day.

Judaism has had the hardest kind of a fight from the beginning. It has had to uplift itself from idolatry and materialism. Its entire history has been a discipline of suffering—a process of chastening. But it has caught some share of the truth and it is needed to emphasize that portion. If it has not realized its ideals, is not this the fate of humanity in general? Yet the mind and heart of the race have been so trained in the school of trial, its intellect so exercised, when any other people would have fallen in the mire and been lost by the way, that there is not a field to which it has been grudgingly admitted which its representatives have not adorned. Art, music, science, law, medicine, finance, philology, the useful trades, philanthropy, has not the Jew's record in these departments of effort been notable in but a single century of emancipation? Surely a religion that can produce such illustrious workers from Josef Israels to Moses Montefiore cannot but be necessary to-day. And as to the future, it will be more necessary as the world's attitude changes and the Jew himself wisely and reverently can give more thought to the changeless spirit and ideals of Judaism than to transient forms, symbols and customs, which, while they may protect and preserve vital principles too often obscure, distort and stifle the truth.

ABRAM S. ISAACS.

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THE TRAGEDY OF GOLF

BY P. A. VAILE

Golf is a great game: a game worthy to be played and loved, as it is by our greatest; but it bids fair to become a national obsession. It sounds slightly axiomatic, but I think we may say that all obsessions are obnoxious. Certainly there are clear indications that the obsession of golf will be obnoxious, if not, indeed, absolutely dangerous.

Coming from me, who have done my best to spread the higher knowledge of golf, this may sound inconsistent. I must be content to let my motive and my reasons for making such a statement appear as I go on with my argument.

Golf with many people in England is almost synonymous with life. They live on the links, and when occasionally off them they talk golf and think golf—and nothing but golf. Their life is dominated by the game. We have, coming after them, another class—a much more numerous class—who are not so fanatically bound to the game, but whose spare time is practically entirely devoted to talking or playing golf. These people are already under the obsession, and they are very painful persons to meet, especially if one be not a golfer.

So long as one can talk golf balls—pimply, dimply, or smooth—spoons, niblicks, stymies, pulls, slices, divots, and all the usual jargon, about which in reality these people know very little, it is possible to hold their interest; but if by any chance one should slip out of this somewhat restricted field into the broader issues of national or imperial politics, for instance, one must be prepared for the vacant eye that tells of a vacant mind chained to a little pimply globe of congo-discord, that dances always before all that there is of mental outlook behind the eye; and this, although not the whole tragedy of golf, is by no means an inconsiderable portion of it.

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Golf at best is a game—a great game, I grant. Had I not thought so I should not have done what I have for it. I have worked for the game. It was a labor of love, and as usual in such circumstances I have been repaid many times. How many golfers do we find who want to do anything for the game? That is one of the truest tests of any one's love for anything or any one. Tried by this standard, how many golfers love golf?

As a matter of simple fact there is but one idea dominating the mind of the average golfer, and that is *to get all he can out of golf*. This may sound brutally candid, but, unfortunately, it is true; and it is necessary occasionally to speak the truth and to speak it plainly. There never was a time in the history of England, or golf, when plain speaking was more necessary than it is now. There is far too much selfishness about it, far too much craving for pleasure and the ease and enjoyment of life without any corresponding idea of rendering any service to any one or anything in return for these benefits—if indeed they are benefits.

So it is with the golfer and his game. He is "all out" for what he can get out of golf. He does not in ninety-five cases of a hundred even try to know it. He plays it in an uninspired mechanical way, for he knows nothing of the soul of golf—he is merely raveling the husk, and playing that which is the most mechanical of games, when it is not understood in sympathy and love, in a soulless manner. Truly, in great measure, is he more an object for pity than for blame; for in many other sports we see nearly as bad a condition, yet in golf there are elements that go more deeply to the root of things than do those in the other sports.

Golf is affected by quite a number of different classes. Firstly, there are those who love it and play it for itself—and know it. Secondly, there are those who like it and play it—without knowing it. Thirdly, there are those who hate it and pretend to play it—because everybody who is anybody does play. Fourthly, there are those, and they are an increasingly large class, who take it like their church, because they have got to know that "it's good for business." Fifthly, there are those who find it a fine excuse for bridge, billiards, and—something else that starts with a b.

The result of all this is that golf clubs are springing up throughout the country, and the game is undoubtedly taking a wonderful hold, not only on England, but on the world;

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and the tragedy of it is twofold. Thousands of the alleged golfers are spurious followers of a noble game, and tens of thousands of both the spurious and genuine followers think more of golf than they do of their own country.

It is hardly too much to say that at this time there are many thousands of golfers in England who go perilously near to deserving the word traitor. I know it is almost a shocking statement to make. Nothing can excuse it but truth. Can it be denied that to-day England needs all the help of all her men to bind her and her Empire together, to maintain her in the position that she has so long held among nations? Can the man who needlessly gives more time to any game than he gives to his country *when she needs him* be considered a loyal man and a worthy son of a great race; in a word, or a few, is he worthy of the great name of Englishman?

I do not know what is thought of it here, but, frankly, in my opinion he is not.

This is another part of the great tragedy of golf. Day after day men who might be of vital service to England in this time of real crisis are engaged in whiling away their time in play. It is not, with all of them, selfishness and want of patriotism. Many of them are retired officers and Anglo-Indians whose knowledge, used in a practical way, might be of infinite value to the Empire, but who at present are in many cases absolutely wasted. There is no provision made for such as these to assist the State with their knowledge and experience. Of course, it may be said that a good man will win his way through and make himself heard. It may be so; but the system of Parliamentary representation in England, with its expensive and microscopic constituencies, tends to keep the best men out of the House.

There is such a sinful waste of time and material amongst the golfers of the United Kingdom that some one should try to do something to remove the reproach. Taken as a whole, the real golfers are recruited from the finest class in the world, and, in many cases, they are both traveled and cultured men. What is to prevent them from forming a Golfers' Imperial League, and doing yeoman service for the Empire by placing at the disposal of the nation the wisdom and experience gained by wide travel and varied service in every corner of the Empire—of the world?

I have the greatest respect for the training a man gets in sport. There is scarcely a better way in which to acquire

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a knowledge of men and how to deal with them, and the idea mentioned by me just now is capable of indefinite expansion.

Apart from the almost sinful waste of time—much of which is due to England—for which golf is responsible, the most objectionable feature of its recent development is the social and business side of it. Multitudes of people now belong to golf clubs just because it is "the thing" to do it. These persons, as may readily be imagined, are simply a pest to the real golfer, when they go on to the links. Fortunately many of them never stir a divot. These and the businesslike person who seeks to extend his connection are what I call spurious golfers. They certainly are not much good to the game; I doubt that the game is much good to them, and I think it problematical that they are much good to the nation.

Hitherto I have been dealing with the general aspect of the tragedy of golf. There is about golf particularly one feature that always seems to me almost sad. It is played by quite the best classes of the community, by our leading statesmen, barristers, and engineers, by our universities and public schools. It has been written up and down, and in and out, by practised players with big university distinction, and after all these years, after all this travail, much of the real beauty of golf has been missed for want of a genuine and sympathetic insight into the mysteries of the game, if, indeed, they may be called mysteries, which really are abundantly plain to one who loves the game enough to seek an understanding of them.

These mysteries—and I call them so only because so far they have escaped the attention of those who have essayed to instruct their fellow-golfers—go right to the root of the game, and are such that no golfer who really wants to know the game in and out may be without them, yet so blind to the truest beauty of their great game have golfers been for scores and scores of years that they have suffered the falsest of doctrine and have assisted in spreading it, and so they are doing now, in golf and in that greater and more important game—the Imperial game.

Now it is easy to make vague general statements like this, so I must give a few specific instances of what I mean. I hold strongly that merely destructive criticism is of little use. Unless a man can show the better way he had better hold his peace.

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With most golfers a good drive is a thing to be desired almost above pearls and rubies, and nearly every book and most instructors try to prevent him getting it. It is not a gigantic conspiracy. It is merely the national habit of borrowing somebody else's thoughts to save the trouble of using one's own brains. So, in the all-important matter of the distribution of weight in the swing, the unfortunate golfer is taught that at the top of his swing his weight should be on his right foot and leg, whereas in very truth it should, if anything, be on the left, or, at most, equally distributed between the two. That which is frequently mistaken for weight on the right is merely the torsional or twisting strain put on it as it turns in the swing. This is most simply proved to be true by fixing from a wall a rigid projecting rod which makes contact with one's neck on the side farther from the hole. It will be found then that without contortion it is impossible in driving to put the weight on to the right foot. The rod is placed against the neck, for even the novice at golf knows that he must not move his head, for if he does he is swaying, which is a grievous fault. The rod prevents his swaying, and incidentally shows him, which few golfers know even now, that the weight is *never* on *the right leg* in a true and rhythmical golf swing. When a golfer has this knowledge he has one of the greatest secrets of that most complicated of all strokes, the golf swing.

So for centuries have golfers who should have known better been worshipping the fetish of the left. In other words, they have preached in season and out of season, mostly out, and in books and out of them, that the left hand and arm is the dominant partner in the golfing drive and that the right is the assistant. This in many cases is done by implication, but there are not wanting instances where learned writers with many university degrees and qualifications and the highest practical success in the game behind them have stated clearly and explicitly that this is so; whereas in truth such doctrine is sheer futility, and is merely calculated to ruin a man's play if he be strong enough and foolish enough to follow it. Fortunately Nature is nearly always sufficiently strong to overcome this faulty teaching, but the mere preaching of it is a sin, and, moreover, is a genuine hindrance to many an aspiring player. It will not, therefore, be out of place to give a few moments' consideration to this matter.

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In the first place, there is no other two-handed stroke in the whole realm of athletics, from wood-chopping to base-ball, wherein the same claim is made. The right hand is everywhere allowed to be superior to the left, as, indeed, is natural. Only in golf has this strange claim been made and tolerated for a time whereof the memory of man runneth not to the contrary. No reason has ever been advanced for this strange assertion, and apparently none has been demanded. It did not even strike its supporters as strange that left-handed people, who had been endowed by kindly Nature with the most important hand and arm in the proper place for golf, immediately forsook their natural advantage, got special clubs built for themselves, and proceeded to play the game as the right-handed did—that is. with the master hand in command. With all the writing that there has been about the power of the left, there has never been a suspicion of an explanation of its alleged power. I believe that I am giving it now for the first time. If not, I am open to correction. It is manifest to any one with the most rudimentary knowledge of anatomy and athletics that at the moment of impact there is very little power in the left. The mere position is a confession of want of power.

In all two-handed strokes, indeed in nearly all strokes, the greatest power is got when the strain of the blow falls across the wrist joint—that is, *not* the way in which it bends. This is what happens in wood-chopping. Now in a properly played golf swing both wrists are practically in this position at the top of the swing. It is here that the left really does make itself felt, but it must be remembered that the right also is in position and doing its work, and that it is always in normal men the stronger. This is where the real wrist power comes into the drive at golf.

I have tried both hands separately in the position used in the golfing drive, and find the left comparatively quite ineffective. I had my results verified by George Duncan, the famous young Hanger Hill professional, who found that he could not get anything like a drive with his left by itself, but that with his right only he could drive nearly as far as with both hands.

These results have given the fetish of the left a woeful shake, but in many places it is still blindly worshipped by confirmed slicers, who have no suspicion of their one-eyed idol.

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Perhaps one of the most blindly followed axioms of the game is slow-back. Thousands who have no idea why they should go "slow-back" do it funereally, which, of course, although they do not know it, is very wrong. I believe "slow-back" ruins more drives than it makes, for it is always so ridiculously exaggerated. Certainly one of the greatest tragedies—or comedies—of golf is to see five feet two of fourteen stone five that has modeled its swing on Vardon undoing itself with the speed of an oyster opening his back door to see if the sun is up. One must not swing back fast enough to waste power and produce unsteadiness in the recovery at the top of the swing. "That is all there is to it," as the American would put it, but it has ruined millions of drives.

How frequently one sees the player instructed not only to keep his eye on the ball, but to study the turf after it has gone. Now, part of the pleasure—in fact, much the greater part of it—in a well-played drive consists in watching the ball. The turf really is quite monotonous by comparison. The only excuse for this advice is that those who lay it down never expect it to be carried out. It is a case of the greater including the less. It may lead to one's keeping one's eye on the ball. If it does, it has done well. I have, however, seen players strong-minded enough to let the ball go, and then go on with their turf study. The inevitable result is a spoiled drive, for a rigid head and neck will kill any follow-through.

In no way, perhaps, has the want of thought in golf been so conspicuously shown as in regard to the golf-ball, the little, pimply, globular tyrant of scores of thousands of those who might be his master had they loved him more and understood him better, for verily he is a tricky little tyrant. He is a restless little monster, too. Try to make him rest in the place where you put him on a billiard-table. He will never do it, for he stands not on one pimple, but on three or four, and he is ever seeking his three-legged stool. This is not such a great handicap to the poor putter while there is some force behind his putt. It is when the last foot or two of fifteen feet come to be undertaken that "Weary Willie" thinks of his stool, and the unthinking golfer curses the green.

Few golfers know what a handicap they are suffering from in both driving and putting with the pimply ball. Following

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some papers of mine on the subject, Sir Ralph Payne-Gallwey, the famous wild-fowler and author of *The Projectile-throwing Engines of the Ancients,* conducted a series of most exhaustive experiments with his remarkable catapults which, in the face of the assertions of the trade, conclusively proved that the modern golf-ball is most untruly and unscientifically made. Sir Ralph's articles occupied three columns of *The Times,* and amongst other things he showed clearly that the center of gravity of nearly every ball tried by him was wrong. It followed that in many cases, apart from the pimples, the balls had a strong bias. Indeed, in rolling from a leaden trough down the middle of a billiard-table many of them tried to get into the top pockets. I have had the same experience myself. Sir Ralph's experiments were most interesting and thorough, and they proved to demonstration that the present golf-ball is too rough both in flight and on the green, but I am not aware that either the trade or golfers have shown any marked inclination to avail themselves of the results obtained by him.

Perhaps one of the most wonderful instances of the golfer's want of insight into the beauty of golf is the controversy that is going on in the golfing world as to how the pull is obtained. Now, Harry Vardon has called the pull one of the master-strokes of the game, and in his book, *The Complete Golfer,* he has told us how to play it, and many other books have told us how to play it, and practically all of them ignore the one thing of outstanding importance—the *upward, outward glancing* blow—and tell one carefully about some mysterious turnover of the right forearm, or, as they call it, wrist, whereas in truth this has nothing to do with the stroke except as part of the natural follow-through of a well-played pull; and in time to come golfers will know and understand this.

The reason that they do not know it now, and do not understand golf better, is all part of the tragedy of golf. They have never made any sacrifice for the game. It has been self first and the game after. If a man loved a woman that way, would he know her? I trow not. So it is with thousands of golfers. They have only the husk of the game; and the worst of it is that they, in many cases, are dead to the rest, to the real beauty, of the game. This is no small measure of the great tragedy of golf.

I was talking to such an one the other day. He said:

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"I am sure I cannot tell how or why I play a particular stroke. I have played them that way since I can remember. I can't be bothered with theory." Yet that same man the day after, before playing a little chip shot out of a bunker, took his handkerchief out of his pocket and flew it to see which way the wind was blowing. He couldn't "be bothered with theory." If he had had the right kind of theory, which is the concentrated essence of the practice of experts, he would have known that any wind that required such detection could not affect such a short low shot, and instead of sometimes getting into the last eight in the championship he might ere this have won it.

He is one of the tragedies of golf—a fair example: an athlete, a cultured man, a golfer from his nursery, and to-day with far less idea as to the meaning of the soul of golf than he has about his own soul.

It may seem to many that I have herein spoken harshly of golfers. I would not have it so thought if I could avoid it. I love the game, and I have had much pleasure from it in many climes, for the brethren of that grand masonic symbol, the club, have been good friends to me the world over, and in England I have had nothing but kindness and the best of good-fellowship, and a most sportsmanlike recognition of what little I have tried to do to spread a knowledge of the game; but even all that cannot prevent me from seeing the canker at the heart of golf, a canker that is sure to be serious if it is not recognized soon, a canker that in any case will be very hard to deal with, but one which may in some way be attended to when once attention has been strongly drawn to it.

Golf is too great a game for those who really love it to stand quietly by and see it develop largely into a social cult or a business affair. Such a development would surely in time work harm to the game.

I was recently waiting at the first tee on the course of a club that shall be nameless. The pair in front of us had come down in a great motor with a famous little actress. They had everything on that any self-respecting golfer would dare—and some extras, and they were out to show her "goff as she is played, don't you know."

Between them they sliced four balls out of bounds into a belt of trees, at almost exactly the same spot, while the little actress smiled. Then they took their cleeks, scraped

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their balls about thirty yards off the tee, and "set about" the unfortunate county.

This is not an effort of my imagination. If it were, I should have varied it more. I could not have imagined anything so ridiculously unlikely as four balls, one after the other, going into the same place with almost mechanical precision.

This is what the social side of golf frequently produces.

I have never had any reason to complain of my work not being taken seriously enough. Indeed, I have on occasion had to reprimand, gently of course, over-earnest golfers who insisted on making the pull or the slice into a question of life or death, and even in writing of the tragedy of golf I do not want to do it with lugubrious thought or expression, for I long since discovered that in this country the heavier one gets the less weight one carries; but I do want in all earnestness to direct the attention of golfers to that which is without doubt the tragedy of the game, and that is, on the one hand, the want of that close and intimate knowledge, that true love and sympathy, that can alone make the real golfer, the sincere devotee of a grand game, and, on the other hand, the blind, selfish following of a noble game by hordes who owe, and are content to owe, a duty to the greatest country on earth, a duty they realize as little as they do the beauty of that which they insult by calling it their game, even while they will not know it.

Many times I have been asked why I write so much about games and play so little. I have never explained why, but the simple reason is that there are many to play and few to work. Now for a time I must work. From a long acquaintance with sport in all parts of the world I have learned more than is known in England, and I have indelibly set my name on the scroll of lawn-tennis, cricket, and golf, not because I wanted to do that, for then, probably, I should not have done it, but because I knew them better and loved them more than others, *and wished the others to share my enjoyment.* That is the great secret—of many things.

The fact is that not only amongst golfers, but amongst England's men generally, there is a deadness of national spirit, a want of imagination, a dulness, an absence of the poetry of life that should pulse in every fiber of the men who are born in a country like England, with associations and traditions such as England's. It is by violence, and

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by violence alone, that they will be brought to see this, and the mildest, most harmless part of the violence they will have to suffer before we see again the rugged spirit that once was in England's sons will be the literary violence of such as I, which springs from a love of England passing the love of Englishmen, for I know her as they do not, and how worthy she is to be loved and worked for—and fought for.

In the days to come perhaps our golfers will realize that some little of their time and thought is due to England. Many of them now serve their country truly and well. Multitudes of them not at all. It is of these I think mostly when I write of the tragedy of golf. I cannot think even of these as wilfully unpatriotic, and I hope that their eyes may be opened to the possibilities before them, and that in a short time I may write of the Golfers' Imperial League instead of "The Tragedy of Golf."

P. A. Vaile.

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II.—DIPLOMACY AND ARBITRATION

BY REAR-ADMIRAL A. T. MAHAN, U.S.N.

Not long ago I was the guest of a large club in New York, devoted to economical subjects and interests, and was an interested listener to several speeches which found their common inspiration in the belief that arbitration could be substituted for war in all cases. It was apparent throughout that by arbitration was meant judicial arbitration, the decision of a court based upon a code of accepted law; not merely an arrangement of differences by adjustment or compromise contrived by practical men of affairs dealing with a difficult situation. Such adjustments have marked hitherto almost all treaties or settlements of any character between disputing nations, and they come under the head of Diplomacy. It appeared to be granted that such codified law does not exist yet, but its possibility in the future was assumed by the generality of the speakers. Law in place of war voiced the aspiration of one; but it is scarcely a misrepresentation to say that effectually law instead of Diplomacy was the desired end, for in diplomacy, in international negotiation, force underlies every contention as a possible final arbiter, and of force war is simply the ultimate expression.

The audience was necessarily sympathetic. The economist as such, and as a rule, cannot but hate war with a peculiar and specific hatred. Its occurrence throws his favorite system into disorder, dislocates the gearing; and the preparations for war are of the nature of so-called unproductive labor in various forms. Independent of the humanitarian evils of actual war which no soldier, not even the most zealous, will deny nor fail to deplore, preparation for war diverts an army of producers for a fixed period of their lives from productive labor, usually so styled, to military training, as well as another subordinate big detachment of work-

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people to the manufacture of weapons of war. The creation of these, from an industrial point of view, is labor wasted, because spent in producing materials economically useless for purposes economically deplorable—at least to a first glance. It may be suggested here, however, as I have on other occasions, that the recognized financial priority and supremacy of Great Britain during the greater part of the last century was really the result of the armed power, the so-called unproductive labor, which through more than a century shielded her industries and commerce. From this point of view the debt incurred and the power expended was of the nature of an investment, in which, as in many other investments, the investor is content to wait through an unremunerative period for the great returns of a discernible future.

A listener who had reached his threescore and ten, whose life had been passed, and his position in life determined by devotion to pursuits so contrary to the mind of his fellow-diners—a military man, in short—could scarcely at the age named listen without a certain element of doubt, of lingering over the past; or without a certain repugnance and dissent to denunciations and prophecies which, if just, signified the passing away of a profession with which his life had been identified, and in the heroes of which he had had occasion to notice, and to know, the elements of greatness which exalted their calling. A member of the first Hague Conference and an interested observer of international affairs for years back, I have become conscious and seek to bear ever in mind that professional prepossession cannot but constitute in me a bias, against which I must be continually on guard, in viewing the origin and progress of the various attempts to substitute other processes for the attainment of the objects which hitherto have been effected largely by war; the study of which, with the consequent absorption of military sympathies, has been the principal engagement of my life experience.

Nevertheless, while thus keeping guard over the temper of my mind, and recognizing that to prefer a state of war to a state of peace would be a grievous twist of character, I could not but think that in the speeches to which I listened there were to be detected fallacies, partial points of view, ignoring of difficult factors. Fundamental among these was the looking upon war as a principal rather than an agent;

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as a cause rather than an effect. There was no explicit recognition of the fact that force, under one form or another, underlies law itself; and that there are necessities which transcend law, a truth which found expression in the phrase once familiar to American ears—"a higher law." There was also the assumption that the individual man has surrendered unreservedly his freedom of action to the commands of law. I long ago pointed out that this is not true. The Fugitive Slave law afforded an instance. American citizens of the most law-abiding and peaceful character in other matters simply refused in this to subject their conscience to law. The instance is too recent to be dismissed as out of date, as some perhaps may feel can be done with the long history of religious persecution and of the martyrs to opinion who refused therein to subject their consciences to law. Armed resistance — that is, war — helped to win for mankind freedom of conscience. In many parts of the world, however, notably in the Mohammedan world, conversion to Christianity is even now more strenuously forbidden and on more extreme principles than it ever was under a Roman Emperor.

At the present moment our own United States refuses directly, as it has for generations refused, to acquiesce in a procedure which, according to the law of nations, is strictly legal. The refusal is not based on grounds of conscience, moral grounds, but on dictates of expediency; a justifiable motive, but one which rests on a distinctly lower plane. Sir Harry Johnston, a distinguished British administrator of long service in Africa, who may be better known to many Americans by his recent book, *The Negro in America,* contributed to the *Nineteenth Century,* in December and January last, two successive articles designed to explain to Englishmen the feelings of Germany. By this exhibition of "the other side" he avowedly hoped to forward, if possible, a good understanding, in place of the mutual suspicion now characterizing the attitude of the two nations, which finds expression in the generally known naval shipbuilding competition. The views he put forth depend upon personal discussions "with German officials, politicians, men of science, heads of industries, and of great commercial firms." In fact, his first article is couched in terms of German opinion expressing itself and, as such, is embraced in quotation marks.

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In the course of the long exposition of the grievances felt by Germany and of the sense of being, as it were, "in Coventry," politically, occur these words:

"Why, Germans ask, in and as regards America, should everything be settled now practically by a joint understanding between Britain and the United States? Why was Denmark some time ago forbidden to sell one or more West-Indian Islands to the Germans as a depot for their fleet in the New World? France, Holland, and Denmark, as well as the British and American Empires, have harbors, coaling-stations, and colonies in the New World, which, especially in the tropical portions, serve as valuable rendezvous for their commerce; why should it be tacitly laid down that if Germany by purchase attempted to get a coaling-station, or a harbor of refuge, it would be equivalent to a *casus belli* with the Anglo-Saxon world?"

In his second article,* elicited by the number of letters and remonstrances consequent upon the first, the writer endeavors to attenuate the impression produced by these words; but expressions once given public vogue are with difficulty recalled, and in this instance, while facts remain vague, there is left no room for doubt as to feelings:

"No German ever mentioned to me any project entertained by Germans for acquiring an island in the West Indies. It is true that some Germans, in their review of recent history, consider it to have been unfair and churlish on the part of the United States, and perhaps of Great Britain, to have opposed the project of the sale of a Danish island to Germany; but the subject was dismissed as one of only academic interest."

Whether this transaction of sale and purchase between Denmark and Germany was actually undertaken and forbidden, and, if so, by whom, I have no means of knowing; but, like every other American, I do know that it would have been contrary to the Monroe Doctrine, which is a distinct, continuous, and developing policy of the United States through now nearly three generations—since long before the present German Empire was constituted. But a policy, however wise or imperative to national interests, as I believe the Monroe Doctrine to have been in origin and in development, is not a law. Consider the proposition as formulated by Sir H. Johnston's article quoted. The sovereign and independent State of Denmark proposes to sell a piece of national property to the equally sovereign and independent Empire of Germany. What is there in international law to forbid? And if nothing, what is there to make the transaction

* *Nineteenth Century*, January, 1911, p. 83.

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illegal? In the existing condition of international law—by which an arbitral court must be governed—how is the suggested transfer to be condemned, or denied, if brought to a judicial settlement? Yet that which such a court must concede, so far as I can see, the United States refuses to concede, and in my own opinion very rightly.

This is one instance of the difficulty which I foresee, an insurmountable difficulty, to the substitution of judicial arbitration for diplomacy in all cases. The insistence of the United States, and the tacit, if unwilling, acquiescence of Germany, are both matters of policy. That of the United States is generally understood; that of Germany is not avowed, for it is not a general policy, only a particular abstinence. Germany has never explicitly recognized the Monroe Doctrine as an element in her general policy, as Great Britain very recently has done publicly, by the mouth of a responsible representative of her Government, Sir Edward Grey, the Secretary for Foreign Affairs in the present Cabinet. By transatlantic dispatch he is reported to have said in a public speech that the Monroe Doctrine, defined as prohibitory of future acquisition of American territory by a European state, is now "our policy"—the policy of Great Britain.* Coming at the moment it has, the statement suggests the undercurrent of exchange of views which necessarily accompanied the negotiation of the pending Anglo-American Arbitration Treaty.

As far as has transpired, the official attitude of Germany toward the Monroe Doctrine leaves nothing to be desired by Americans, but she has never made to my knowledge a distinct pronouncement in its support such as the above. Speaking under correction, it appears to me that if the question posed in Sir H. Johnston's article were raised under an unqualified Treaty of Arbitration with Germany, and it went so before a court, the United States would lose its case, and must accept a German naval station in the waters of the Caribbean Sea, with all consequences.

* The precise words of Sir E. Grey were: "The Americans have a policy associated with the name of Monroe the cardinal point of which is that no European or non-American nation should acquire fresh territory on the continent of America. If it be, as I think it must be, a postulate of any successful Arbitration Treaty of an extended kind that there should be no conflict, or possibility of conflict, between the national policies of the nations who are parties to it, this condition is assumed between us."—*The Spectator,* May 27th.

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A conviction of similar character was expressed to me, when a delegate to the Hague Conference in 1899, by the principal representative of one of the smaller European Powers, with reference to our war with Spain in 1898. The person in question was a man of mature age who had passed his life in diplomacy; much of it in the United States, where he had married an American wife. He was then minister for his country to one of the principal European States, which may be taken to indicate his standing with his own government. Our demands upon Spain at that time and our course of action could not be justified in law, he thought, before an international court deciding between the two countries. Our demands were based upon " the abhorrent conditions which for more than three years had existed in the island of Cuba, so near our own borders." The incident of the *Maine* was mentioned, but it was supplementary and cumulative; cited as incidental to the general conditions, not as a primary cause of action. This is a fact well to be kept in mind at this particular moment. In other words, the domestic conditions of a certain integral portion of the Spanish Empire were given as the motive of the demand which led to war; precisely as the domestic institution of slavery, though not the immediate motive to the War of Secession, had led by an inevitable series of consequences to conditions which caused war.

International law concedes the legal right of any State to declare war, leaving it arbiter of its own action. It does not concede the like right of one independent State to intervene in the domestic concerns of another, except by permission or at the price of war. It is easy to see that such right of intervention would be contrary to the sovereignty of the State. Although self-government is not necessarily equivalent to independence,—Spain proposed autonomy for Cuba as an ultimate solution, but refused to entertain the proposition of independence,—independence includes self-government. Foreign intervention in domestic concerns impeaches both, whether such intervention be by another State or by an exterior tribunal. The demand of the United States that Spain should evacuate Cuba, leaving its people free and independent, could not therefore be justified by law if brought before a tribunal, unless Spain were willing to submit to the court the question of whether she should remain in Cuba or not; a precedent which, if established, might

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carry us far, and bring into litigation much of the existing status of the world.

Yet, consider the moral grounds for forcible intervention; concerning which a distinguished British officer, who, it happens, by a rarity among British soldiers, is a strong Liberal in politics, said to me: "If the conditions of Cuba had existed as close to our doors as to those of the United States we would have interfered similarly." Since then—I like to vouch for my authorities—the officer in question has occupied continuously higher and higher positions in the civil and military administration of his government. An American in close contact with London feeling, official and other, affirmed at the time this general attitude. "The commonest phrase here is: 'I wish you would take Cuba at once. We wouldn't have stood it this long.'" Consider, I repeat, the conditions. In 1900 a very prominent gentleman, whose name, if mentioned, would be recognized by three-fourths of those who may read these lines and who had had close observation of Cuba during the revolt, said to me: "I asked Senator Proctor why, in the report of his visit to Cuba, he had not mentioned such-and-such things. The reply was: 'If I had told all I saw there would have been no holding our people back'"; and at the moment there were still hopes of a peaceful solution. I may add I have verified this recollection by a present reference to my informant.

If the hand of the United States had been stayed in this instance by an adverse arbitral decision upon legal grounds, upon what other legal grounds could the court have proceeded to right the misgovernment, to which was due the hopeless sufferings endured by the innocent Cuban population? Hopeless, I say, for it may be considered demonstrated that Spain with the best intentions has not the political aptitudes for well-governing remote dependencies. All that could come before an International Arbitral Court was the case between the United States and Spain. Spain's dealing with the revolt was a matter of domestic policy, not under the jurisdiction of a court instituted to decide international questions only. As it was, diplomacy settled that to which law was incompetent. It did so by using its last argument—force. It is out of place here to enlarge upon the benefits that American occupation, the result of war, conferred upon the ceded colonies of Spain. Sir H. Johnston, in one of the articles already cited, says, quite incidentally:

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"To what degree have not the Santo Domingans, Porto Ricans, Cubans, and Filipinos profited through the intervention of the United States? I can testify from personal observation of the first three that the only adverb to be used in this connection is 'enormously.'"

Yet the intervention, if my diplomatic friend was right, could not have been permitted by a tribunal of arbitration. Such can decide only upon positive law, or upon fair rational inference from some existing law, or precedent, applied to a novel condition; in such case a legal inference rather than a positive law. There is as yet no proposition to constitute a tribunal empowered to authorize intervention in the domestic affairs of an independent State, or itself to exercise such intervention; but it seems probable that, in the borderland where international and domestic meet, there may be found the means of a transition to such interference. If so, this will trench heavily on that principle of nationality which has been the distinguishing element in modern European progress, since the centralizing conception of the Roman Empire, and the strong intervening hand of the Papal arbiter, lost their hold on European mankind.

The vista opened by such a prospect is indeed formidable, yet already there are premonitions of the attempt. At the International Peace Conference held in Stockholm in August last, a native Egyptian asked the Conference to express its sympathy with the Nationalist cause in Egypt and to direct that the Egyptian question should be placed on the programme of the next Conference. Instead of laying the proposal aside, as being under present conditions not an international question, the Congress decided to leave the matter to the Peace Bureau at Berne. A similar course would doubtless have been taken if a Filipino had requested a like interference for the Philippines; and the fact that a small but active minority in the United States would have sustained the proposition shows the greater chance there is that an Arbitral International Court might thus extend its jurisdiction by unconscious usurpation. It is easy to see that questions such as this approach a border line which might be insensibly crossed. There are questions of domestic regulation which affect foreign States, possibly unequally and invidiously. At present, the time-honored custom of nations is to respect the national sovereignty, confining objection to diplomatic remonstrance; or, if the worst come, resorting to war, which does not infringe national sovereignty. It seems

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likely enough, however, that, once familiarized by habit with the idea of external intervention, such questions as the regulation of immigration, as a matter of intercourse between nations, might be brought before an arbitral court. Our Government has not thought necessary to ask the consent of other nations to fortifying the Panama Canal; but in influential quarters in Germany and Great Britain it has been suggested that to arbitrate this question, which affects "the vital interests of a great nation," would be highly edifying.

At the first Hague Conference there were audible whispers of two skeletons in the closet of the International Happy Family there assembled which might at any moment be revealed. As is the case with all such skeletons, unless they do appear, mention was reserved and vague; but there can be little doubt that they were there, though kept throughout decently curtained. They each illustrate questions in which legal decisions would be, probably, a far less happy solution than that of the rude hand of power. Of these one was the desire of the Papacy to be admitted to representation in the Conference; and a somewhat curious incident attending its close was the reading to the Conference an admonition addressed, if I rightly remember, to the Dutch Government, as the formal convener of the Conference, commenting on the absurdity of excluding from a peace conference the Power that had done so much to advance the cause of peace in the world.

The Conference being an assembly of secular States, not spiritual, the admission of a Papal representative could only be as that of a temporal Power, to which, it was said, Italy demurred; and naturally, because it would have recognized the temporal power which the Papacy still claimed as against the Italian occupation. Yet, why was the Papacy not a temporal Power, legally, in 1899? It claims to be so in its own right unsurrendered, despite the Italian occupation, which from the Papal point of view did not alter the legal fact; just as the United States dates its independence from its own declaration, not from recognition by Great Britain. The essence of a State—as the word shows—is that it exists by its own will. The only thing, as yet, that can reverse that will is the accepted result of force. International law accepts accomplished facts. The secular occupation of Rome, which the world at large, outside of the devout adherents of the Papacy, justifies as morally right,

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is now legally complete and, therefore, is now such a fact; but, however morally right, it could never have been accomplished by arbitration. The Papacy would probably have refused to arbitrate, to acknowledge any superior judge in its own case; but, if brought to court at the first, the facts would have been that the Papacy then was a secular government of long standing, *de jure* and *de facto,* and no counsel of expediency could have swerved a just court from the decision that it had all the legal qualifications entitling it to continue. Italy would have been maimed of its capital.

The other skeleton was the dispute between the British Government and the Boer Republics. These, it was scarcely a secret, even open, were trying hard to get the matter before the Conference, in the shape probably of admitting delegates. This step would have acknowledged as unqualified an independence which in British affirmation was qualified, and at most amounted to the right of self-government. Sovereignty, which is the attribute of a State wholly independent, was in their case qualified by the unrelinquished suzerainty of Great Britain. If this were so, and after careful reading of the official papers at the time I think it certainly was, any recognition of the Republics, or cognizance of the dispute, would have been an intrusion into the domestic affairs of Great Britain, just as any question by another State of our administration of the Philippines would be. The Philippines, however useful our occupation may be to the inhabitants, are ours by right of conquest from Spain, by legal right; and our administration there is a purely domestic concern.

At the time, as I read the agreements between Great Britain and the Boer Republics by which their relations were then determined, Great Britain had not any right, and expressly disclaimed any right, to interfere with their self-government, including the question of the suffrage, on which most hinged; no right, that is, except the right of war, which as yet belongs to every State which feels it has wrongs to be redressed. If war were excluded, by consent to judicial arbitration, no redress was possible to the internal abuses of a government concerning which Mr. Bryce, an opponent of the war, wrote:

"President Krüger and his advisers committed the fatal mistake of trying to maintain a government which was at the same time undemocratic and incompetent. An exclusive government may be pardoned, if it is ef-

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ficient; an inefficient government, if it rests upon the people. But a government which is both inefficient and exclusive incurs a weight of odium under which it must ultimately sink, and this was the kind of government which the Transvaal attempted to maintain."

Yet, despite this severe condemnation by an observer who at the worst was unbiased, a court could have given no redress, because the legal facts were against it; that is, the legal fact of the right to self-government conceded in a convention by Great Britain. The result, under the international law of then and now, was war; and consequent upon war such a political reconstitution as has replaced a congeries of rival and partly hostile communities, with strong racial oppositions, by a union of States. A South-African of English birth, who has resided there since the war and been active in politics, told me recently that in his judgment nothing but union could have saved another war. Union would have been impossible under the old conditions of Boer self-government in two States; and only force could have solved a difficulty to which existing international law was incompetent.

At the dinner in question much stress was laid by one of the speakers upon the opinion expressed to him by a well-known president of an American university, that no one of the wars in which the United States has been involved could not have been avoided. This is one of those remarks which says either too little or too much. If it is meant that in each instance, if both parties had been reasonable and righteous in their acts, there need not have been war, too little was said. No one will dispute the assertion so qualified. If it is meant that, things being as they actually were, war could have been avoided, too much is affirmed. Doubtless opinions may differ, and this may be considered matter of opinion, but as such it may be discussed.

Of the Mexican War I have no competent knowledge; but with the War of 1812, with the conflict of views and interests which led to the War of Secession, and to a somewhat less degree with the War with Spain, I am familiar. If it is meant that an arbitral court could have settled these disputes upon legal grounds, the reply is, that, in one of the two principal causes which led to the War of 1812, Great Britain, while maintaining the necessity and consequent propriety of its action, admitted it to be without sanction in law. An arbitral court could have affirmed no more. In 1861 a

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like arbitration, whatever its result in conceding or denying the right of secession, would have maintained slavery in existence for generations longer, for the United States Government did not allege slavery as a justification of the war; a course which alienated many warm foreign sympathizers. Abolition was a war measure pure and simple. It could never have been a result of legal arbitration.

In the War with Spain there were no legal grounds upon which an arbitral court could have decreed the relinquishment by Spain of her colonies. War alone—actual or threatened—could have enforced the demand of the United States that Cuba be evacuated, and from war resulted the beneficent progresses that are known and noted. As a matter of private opinion, the members of a court might have considered it demonstrated that the time for Spain to go had fully come; but as a matter of legal decision there was then, and is now, no ground upon which to base a judicial sentence to that effect. Diplomacy failing, war alone was competent and war alone still would be. I am aware that persons in eminent position believed that with delay all the results of the war could have been secured from the Spanish Government without bloodshed. Granting that they were not mistaken, the difference of agency would have been that between war potential and war actual; in either case force, intimated by the United States, would have determined the issue. The ground of domestic bad government, however extreme, is not one for an international court; exactly as the ground of good government does not constitute the legal justification of the presence of Great Britain in Egypt or of the United States in the Philippines, however deplorable might be the results of withdrawal in either case.

A. T. Mahan.

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THE LEAVES OF THE TREE*

BY ARTHUR C. BENSON

VI—MATTHEW ARNOLD

It is the hardest thing in the world to recover what one really thought or felt, or even knew, about great men or great books, when one was young. Subsequent knowledge and feeling have gone on trickling down, like stalactites from the roof of a cave, blending with and penetrating the original tiny core of experience. It is so impossible to shut off all the new light, which has since intervened, from the old picture! I cannot now disentangle what the essence of my genuine admiration for Matthew Arnold, in my school days, was. I did not know many of his poems. The "Forsaken Merman," which I learned by heart as a child, seemed to me rather silly and trivial, I am ashamed to say. I certainly had not read any of his prose works. But he was the son of Dr. Arnold, who was one of my father's heroes, and whose life I had read. In any case, I was prepared to see a great man when he came down to Eton to give his lecture on εὐτραπελία—versatility. It was going to be an event, and an event it was. I can remember the dignified suavity with which he took his place, the dark head, with its rippling glossy hair, sinuously and graciously inclined, the big side-whiskers, the large expressive mouth, the grave ecclesiastical smile. The opening sentence about the philosopher Epictetus, and his complaint of the quality of the water in the bath, arrested me by its urbanity, its elaborateness; and by the sense that our instructor recognized himself to be, like the wise householder in the Gospel, bringing out of his treasury things new and old! I did not know what culture was in those days. I liked the books which amused me; I had no scheme of self-improvement, and not the smallest touch of ambition. But the whole discourse had the charm of a mysterious secret, of which our kindly and kingly lecturer

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had the dispensing. Something stirred and fluttered in my soul. This was not the hard and dull knowledge, like brickbats, which fell from many of our teachers: it was not a taste of bitter and loathsome grammatical facts, which had no connection with each other or anything else; dreadful rules which had to be learned, in order to play the dreary game of education. There was something harmonious and seductive about what he was telling us, a sense of living men and living ideas—where language for a moment became, not the ashes of the human rubbish-heap, but coals glowing with the fire of the heart. I do not mean that I then and thus elaborated my thought; but it was a revelation of beautiful things within reach of one's hand—living ideas, glowing images.

I felt a sense of princely condescension and of active kindness about Mr. Arnold that he should be willing to instruct us. His utterance did not seem like persuasion, but a priestly sort of ministering of undoubted grace. The effect soon faded away; but it induced me, I remember, to read his poems, with an odd mixture of pleasure at the beauty of many of them, together with a sort of revulsion at the hard, plain, and knotty lines that lay among the richness, like the pointed kernel in the honeyed plum. One of my school-fellows was his nephew, and I secured an autograph, not indeed of the poet himself, but of his wife, which seemed to me a precious leaf from very near the rose.

Then, at Cambridge, I fell wholly under the spell of Matthew Arnold's writings, prose and poetry alike. He seemed to me the one faultless writer; and there came a day when he delivered the Bede Lecture, in the early eighties, and received an LL.D. degree. I was asked as an undergraduate to the great garden-party at King's, where the Doctors all appeared robed in glory; and while I was talking to the kindly Mrs. Westcott, wife of the Bishop, I suddenly descried two figures standing together and surveying the scene—Sir Henry Maine and Mr. Arnold. One little thing struck me. Most of the Doctors were wearing their scarlet gowns and their odd, flat, gold-corded velvet hats with an air of obvious and fearful joy. They had become, most of them, mere lay-figures, with a foolish smiling figurehead at the top, instinct with complacent vanity. But Maine and Arnold alone appeared to wear their gowns like customary coats, each as one

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"That tricks his beams, and with new-spangled ore
Flames in the forehead of the morning sky."

There was no parade about it; they shone because it was their fate to shine. I murmured a heartfelt wish to Mrs. Westcott, who, with motherly kindness, went straight up to Mr. Arnold, I trailing in her wake, aghast at my boldness, and said, "Mr. Arnold, here is a young man who wishes to be presented to you. You know his father—the Bishop of Truro."

The moment was come. The great man held out his hand, said a few pleasant words about my father, and then, when I was about to retire, nodded to Sir Henry Maine, and said to me, "Come and walk about with me a little, and point out to me some of the celebrities." He even put his hand within my arm, and I had a few minutes of awe-struck rapture, parading before the guests in a kind of gorgeous intimacy with one of the first spirits of the age. I did my best to obey his instructions, and was at last dismissed with a delightful smile, and a wish that we should meet again.

We did meet again. My father became Archbishop of Canterbury, and Mr. Arnold used to dine with us at Lambeth; I have little doubt I bored him horribly, for I contrived more than once, when the ladies left the room, to slip into a chair beside him. But his graciousness was perfect. He treated me as he might have treated the most honored of our guests, and gave me of his best. My father had a real affection for him, not unmingled with terror. He considered him a dangerously subversive writer, but, I think, also thought of him as not likely to do serious harm to the cause of orthodoxy; while he loved his poetry so much and respected his sense of things ancient and beautiful so deeply that his admiration was wholly sincere. One interesting and characteristic story about him he was fond of telling. He had sate next him, on the first occasion of their meeting, at the house of Mr. Charles Arnold at Rugby. Matthew Arnold had uttered some humorous semi-cynical statement, to the effect that it was useless to try to enlighten the general public, or to give them a sense of due proportion. My father was somewhat nettled, and quoted a few lines from the celebrated sermon of Dr. Arnold's on Christian Education. Matthew Arnold smiled affectionately at him, drooping his head sideways in his direction, while he patted his shoulder, and said, "Very graceful and appropriate,

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my dear Benson, but we must not take for Gospel everything that dear Dr. Arnold said."

It was incidents and sayings such as these—half-genial, half-ironical, and not really quite tactful—that gave Matthew Arnold the reputation for conscious superiority which the reality so instantly belied. It was only necessary to be once in his presence to know, with a certainty that could never be shaken, that he was the kindest, most amiable, and most delightful of men. He was simple, humorous, sweet-tempered, and natural. Yet the tradition persistently lingers that there was something supercilious and disdainful about him. Perhaps the tone of his writings, which have been described as " painfully kind," like a sage pleading graciously with a stubborn and stupid child, his magnificent manner, his dramatic eye-glass, may have created this impression. He was thought to be affected and academic. Probably, too, this view of him was augmented by Mr. Mallock's delightful satire, the *New Republic,* where Mr. Luke, who stands for Arnold, is depicted as languid, affected, and patronizing. Yet his letters alone, which are really almost too homely for preservation, might have disposed of this strange perversion. Even his liberal use of irony—that large, courteous, Socratic irony, which plays lambently over the type, and seldom scorches the individual —never made him unpopular; and in private life he was simply irresistible.

He was born in 1822 at Laleham, near Staines, in the great alluvial plain of the Thames. His father, Dr. Arnold, was then an unknown man, making an income by taking pupils. Two more diverse temperaments than those of father and son could hardly be selected. Dr. Arnold was earnest and strenuous, with the kind of passionate idealism that, while it inspires the enthusiastic with the same intense quality of emotion, is apt to take the heart out of more leisurely and easy-going natures. A man who could burst into tears at his own dinner-table on hearing a comparison made between St. Paul and St. John, to the detriment of the latter, and beg that the subject might never be mentioned again in his presence, could never have been an *easy* companion. Dr. Arnold was a hero of men: he had a Herculean task to perform, and he performed it with marvelous courage and industry. But such a spirit flies abroad like a flame, and withers where it does not ignite. It is impossible not

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to feel that Dr. Arnold would have regarded his son's religious writings with shame and horror. And yet, strange to say, both father and son were attacking very much the same things and championing the same cause. Dr. Arnold hated tyranny, and had the true Protestant spirit. The son loved grace and light, and hated stupidity and conventional ineptitude. But the difficulty with such natures as Dr. Arnold's, with their intense capacity of translating theory into practical life, with their sharply defined principles, their ardor of hope, is that they cannot concede to others more liberty than they are themselves determined to possess. Dr. Arnold's liberalism was part of a very clear theory of government and practice. He did not wish others to be free on their own lines, but upon his own. He gave his boys liberty with a generous hand, but woe betide them if they extended that liberty; they had then, in Dr. Arnold's mind, abused it. Neither had Dr. Arnold a sense of humor. The ironical attitude, the half-pathetic, half-amused contemplation of perversities and stupidities, which you can perceive, but cannot terminate, was abhorrent to him. It was a kind of cynical trifling with the urgent issues of life. There is evidence that father and son did not wholly harmonize in the school days of the latter. But, if Dr. Arnold had lived to be an old man, it is difficult to say what would have ensued. Matthew Arnold's filial piety was so strong, he was so

> "decent not to fail
> In offices of tenderness,"

that he would have very possibly suppressed opinions the avowal of which would have caused his father unmitigated pain. But Dr. Arnold died in 1842, when his son was an undergraduate at Balliol, and the collision never came in sight.

Matthew Arnold's Oxford career was not an entire success. He only obtained a Second Class in the final Classical Schools. But this, as in the case of Newman and Clough, was more than atoned for by an Oriel Fellowship, which was still considered the highest intellectual honor that Oxford could bestow upon a young man of promise.

He went for a time to Rugby as a master, and then became private secretary to Lord Lansdowne, who was one of those quiet, imponderable personal forces in mid-Victorian politics to which history inevitably does scanty justice. Lord Lans-

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downe led the House of Lords, and was consulted on every matter of political importance. He was a strong Whig, at a time when Whig opinions were still on the side of progress. Whiggery now seems a disagreeable blend of privilege and democracy, combining a convenient belief in popular liberty with a still stronger belief in personal prestige. Matthew Arnold's politics, nominally Liberal, were to the end influenced by the bias communicated to them by the serene dignity of his old chief. Yet the period of indoctrination was short enough. A political secretaryship is a fleeting thing; and within four years Matthew Arnold was appointed to an Inspectorship of Schools, a post which he held for thirty-five years.

It is natural, I think, to over-estimate the services which Matthew Arnold rendered to the cause of national education. He had, of course, a perception of the fact that if the democracy is to rule the State, the only hope is to educate the democracy up to its vote, and to give it an inkling of what political progress is. But his real concern lay with secondary education, and, though he was a kindly and sympathetic inspector, it is clear that his ideal of education was built upon the old humanistic basis. He overrated the force of classical culture, and he did not perceive that what, under earlier conditions, had been a real tincture of mental habit, was becoming, under modern conditions, a merely sentimental veneer. The modern function of education, in its civic aspect, is to initiate the youth of the country into clear conceptions of the possible reconstruction of political stability under democratic conditions. Matthew Arnold had a theoretical sympathy with the possibilities of scientific education, but his real sympathies lay with the attainment of literary culture. Hence he suffered from the inevitable backwardness of mind which befalls all those who can only meet actual difficulties, arising out of changed conditions, with a vaguely lyrical proffer of ancient complacencies. He was in favor of State supervision and publicity in education, but the result of his own and like-minded efforts was to establish a system of primary education which corresponds very little with the needs of the class educated; while secondary education, which was, and is, in urgent need of simplification and co-ordination, has been left in the hands of monopolists and traditional exponents of outworn theories. The secondary schools of England are still as much in need as ever of the qualities which Matthew

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Arnold endeavored to enforce, while the effect of the type of primary education adopted has been to upset and subvert traditional class-feeling, without providing any social outlet for the type thus educated. It is useless to organize education without knowing very clearly what end is in sight. Matthew Arnold had little grasp of social eventualities. He knew clearly enough what attitude of mind he desired to produce, and still more clearly the middle-class attitude of mind that he abhorred; but he did not grasp the fact that education must be closely adapted to the material available, and that to achieve results it is even more important to know what instincts you have to act upon than what result you would desire to produce.

Matthew Arnold was made Professor of Poetry at Oxford in 1857, and held the post for ten years. His discourses were elegant and stimulating, but made no great mark on the literary history of the period. His official life lasted until 1886; but he found time to play a considerable part in the social life of his day. He was a welcome and honored guest in all societies; and in later life he made a lecturing tour in America, where his great ineffectiveness as a lecturer only emphasized the enthusiastic respect and admiration with which he was everywhere received.

The last time I ever saw him was in 1887, at Windermere Station. He appeared to be in the very flower and vigor of a strong and dignified age; but he died six months afterward, from the effects of hurrying to catch a tram-car in the streets of Liverpool, at the age of sixty-five. This swift and painless close to a life full of activity and social enjoyment was but the last of the felicities which attended him from birth to death.

As a literary critic Matthew Arnold was fanciful and even whimsical. But this is a small matter in face of his urbanity, his exquisite taste, and his delicacy of perception. He may be said to have inaugurated, or at all events to have given prestige to, a new school of criticism. The old-fashioned *saugrenu* theory of criticism—the criticism of Lord Macaulay and the Edinburgh Reviewers—is slowly, it may thankfully be believed, dying a natural death. There were two modes of criticism extant in the earlier part of the century, and it is hard to say which is the more futile. The benevolent critic classified authors, and placed them in lists, like Tripos lists, in classes and brackets; authors

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had to be compared and pitted one against another. If poetry was in question, another class-list was brought out, say of elegies: "Lycidas" came out first, Gray's "Elegy" second, and so on. The stricter method was to sit in judgment, and to pronounce what was right and what was wrong. The critic was a judge, and authors were arraigned before him. If an author was approved, he was acquitted without a stain on his character; if he was disapproved of, he was taken to task as a nuisance to society, and received a harsh and ignominious sentence, with every sort of wounding ridicule that could be heaped upon him. It was an attempt, a conscientious and complacent attempt, to establish standards; but it overlooked the fact that criticism is ultimately based upon individual opinion, and that opinion shifts its channels. The most that one can say is that, if a book approves itself to generation after generation, and satisfies both trained and untrained opinion, it probably has some quality which corresponds to an instinctive sense of beauty in the human mind. But there is no scientific standard instantly applicable in the case of contemporary work. Dr. Johnson was a shrewd and perceptive judge of certain qualities in literature, but the fact that he thought the *Pilgrim's Progress* a stupid and barbarous book does not make Johnson a bad critic or the *Pilgrim's Progress* a bad book. All that the most acute critic can do is to discern qualities in a writer that are likely to prove congenial to cultivated minds and hearts. It is the same with natural objects. One cannot say that the Matterhorn is a beautiful mountain and Monte Rosa an ugly mountain. What one can do is to perceive that the Matterhorn has certain arresting qualities, which for some unknown reason are likely to continue to appeal to the human imagination. When one comes to individual books, it is no more possible to explain why one is beautiful than to explain why human beings like mutton and do not care for horseflesh. All writers, all books, all poems are unique; and it seems gradually dawning upon men that the true function of criticism is only that of discerning and interpreting excellence, and that the only comparison worth making is the comparison between a writer's intention and his performance.

Matthew Arnold had strong preferences of his own. He did not care for Shakespeare, Tennyson, Shelley, Keats, or Thackeray. On the other hand, he had a taste for discover-

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ing, and for praising almost extravagantly, little literary figures of no great significance. Amiel, Joubert, the two Guérins, were figures on whom Matthew Arnold conferred a prominence which they did not wholly retain. He liked a subtle and suggestive kind of moralizing; he sympathized with a melancholy outlook on the world. But in so far as he saw and felt the charm of these writers, and made others feel it, he discharged the true critical function. After all, the victory rests with the man who sees and feels beauty, not with the man who is unaware of it. The Guérins, in their slender way, were as beautiful as the purple toadflax on the crannied wall. They were not beautiful as the Matterhorn is beautiful; but they had a delicate quality of their own, and were perfect on a small scale. People who are touched and satisfied by the toadflax need not be scolded for not admiring the Matterhorn. It is more important to realize quality than to reverence scale. The critic who appraises is only a sort of auctioneer. The true critic is one who takes a theme, whether it be Maurice de Guérin or Shakespeare; sees its delicate outlines or its majestic curves, its sweetness or its majesty, its connection with life and death, its truth and its sincerity; and on this theme, large or small, soft or loud, he must create something organic, that in itself is a criticism of life.

There may, of course, be people who think it valuable and instructive, and even interesting, to have books marked and classified; and, if there is a demand, there is no sort of reason why literary salesmen should not discourse in public on these lines. But Matthew Arnold was not a critic in that sense, and he was a critic in the larger sense—in that he had his eye on life and his finger on the pulse of humanity—and thus set himself to criticize the strange fruit of human utterance, which is both a part of life itself, as well as its expression and reflection.

He was a critic in his seriousness, his disinterestedness, his desire to get at the meaning and essence of it all. He had a finely trained intelligence working on systematic lines. His great maxim in criticism was this: "I wish to decide nothing as of my own authority: the great art of criticism is to get oneself out of the way, and to let humanity decide. There he struck a very true note. The critic is a pleader, not a judge, and still less the epitome of a jury. His business is to present the case truthfully and lucidly, but the ultimate decision lies elsewhere. Arnold struck a true note in his book, *Culture*

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and Anarchy, in which his point was to prove that lawlessness in art was the lack of proper deference to the authority of the cultivated persons; but even so, no deference to the individual critic can be demanded, because the individual cannot wholly discard his own preferences. Deference is due to a slowly accumulated body of cultivated opinion; and even when one has said that, one is little better off than before, because the only admiration that is worth anything is genuine admiration, and the admiration which is the result of deference to opinion is a perfectly valueless thing. What deference ought to make men do is to give literature a fair trial, and not to decide hastily; and if one disagrees with the verdict of the ages, to conclude that it is probably oneself that is deficient, and not that the ages had no right to their opinion.

A critic who did not agree with Matthew Arnold's judgments spoke acrimoniously of Arnold's belief in the well-known preference of the Almighty for University men. The criticism was not wholly undeserved. Behind Arnold's deliberate and instinctive urbanity there lurked a well-bred contempt for the mob—for all that was loud and violent and brutal and rude. But this was not the impotent rage manifested by weakness for good-humored strength, as by Miss Squeers for John Brodie, which is too often the attitude of the literary man. Arnold regarded the uncultivated as the lost sheep of the House of Israel. What he really did openly despise and dislike was the gross, robust, and complacent self-satisfaction of the middle-class—the Philistines, as he christened them—who despised ideas because they thought they had secured what was better worth having—a measure of material comfort. But the irony in which he indulged at their expense never made him unpopular, because he attacked, as a rule, the type, and not the individual; and when he did attack the individual, he seasoned his contempt with a deferential consciousness of his adversary's strength, and with diplomatic compliments. Even his ridicule was of a kind which ministered agreeably to his victims' vanity—to such an extent indeed that it rather confirmed them in a perversity which seemed so distinguished, than induced them to wish to alter their methods and opinions.

Arnold was thus not an appraiser of literary values, but a critic in the sense that he heightened and dignified the interest and the appreciation of art and literature; and a critic, in the larger sense, of his age, in the fact that he saw clearly

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its strength and its weakness, and held up his flattering mirror to its smug and comfortable visage. Perhaps his best service of all was to show that a critic can be well-bred and urbane, and that he thus does far more for the cause that he has at heart than when his native irritability throws out malignant sparks at its contact with life, or when he vindictively punches to pieces some of the helpless and grotesque vermin of letters, in the spirit of the gardener who hewed the toad to bits, like Agag, saying that he would teach it to be a toad.

It is difficult to estimate what the precise effect of Matthew Arnold's religious opinions upon contemporary thought exactly was. He was in no sense a pioneer; he rather focussed a great amount of floating opinion, and expressed with grace, force, and simplicity what a good many cultivated people were thinking. "I *thrive* on religious exegesis," he once said to a friend who inquired after his health. His religion was a literary Pantheism, with a strong tinge of Christian Idealism. He could not accept as proved the doctrine of a Personal Divinity. Unfortunately, with his relish for phrases, he invented a new and extremely unattractive formula for a very simple idea. "The Eternal not-ourselves which makes for righteousness" was in its way a formula as disagreeably definite to agnostics as the technical statements of the Athanasian Creed, without the advantage either of the familiarity which leads simple people to overlook the precise significance of clauses which have become habitual, or of the venerable and emotional associations which gather round expressions that have been consecrated by religious solemnity. The ordinary man does not want to think of the Divine principle as a sort of electricity, of which the untamed manifestations are disastrous and the subdued uses beneficial, but all the workings of which are blind and mechanical. If the mysterious force behind the frame of things has anything so definite in view as right conduct, the human mind is more than justified in using a concrete symbolism, for the simple reason that it cannot think in abstractions. A human being, with its intense consciousness of what it means by the word "self," can hardly be trained to think of that self as being originated by any power which is not also personal. Indeed, the evolution of consciousness from unconsciousness is an unattainable thought. Our intense sense of our right to happiness inevitably leads us to interpret the events of life as being framed to develop that happiness, and our natural

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optimism triumphs over unhappiness, by imagining that the disasters of life must somehow be intended to minister to ultimate content. Thus, on the constructive side, Matthew Arnold's theory must be held to have failed, because it provides no medicine for discontent and despair. If there is only a passionless force making for righteousness, if no alliance of the human will with that force is possible, then, however true the theory may be, there is no reason for attempting passionately to embrace it. It can have no value for humanity till it is proved to be true; and if it is proved to be true, it is a very discouraging business.

But where Arnold undoubtedly did help his generation was by showing thoughtful minds that they need not necessarily abandon Christian principles and Christian hopes because they could not believe whole-heartedly in ecclesiastical title-deeds. The modern critical position with regard to the miraculous element of Scripture is not that it is necessarily untrue, but that it needs more proof than the records can possibly furnish.

Matthew Arnold's view of Christ was very much what his view would have been of St. Francis of Assisi. Any one who reads the "Fioretti" of St. Francis must feel perfectly sure that there is a real human being behind the record. But when the narrator says that St. Francis's head threw out flames as he prayed, and that, when an inquisitive Brother came nearer to observe the phenomenon closely, St. Francis turned round and blew him with a breath to the other end of the room, no one can be compelled to believe the statement, or to give up his belief in the actuality of St. Francis if he disbelieves it. The obvious *bona fides*, the naïve simplicity of the "Fioretti," do not necessitate one's adherence to the belief that St. Francis reduced by a scolding the cannibal wolf of Gubbio into an affectionate kind of lap-dog. That did not seem impossible in an unscientific age. The real marvel would have been if St. Francis's recorded life had been unattended with such reported occurrences. Of course, the difficulty is where to draw the line, but the difficulty is more theoretical than practical. Matthew Arnold's view was that in the Gospel we have the history of a character of supreme moral insight and transcendent spiritual force, and that the great and noble principles of life uttered by Jesus of Nazareth could never lose their indisputable power and truth. It was, no doubt, an intense relief to many thoughtful minds to

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find a man of high enthusiasm and stainless life saying frankly that no one need trouble his head about the legendary element of the Gospels, but also affirming that, on the other hand, the sayings of Christ afforded a final and ultimate standard of conduct and impulse. The mistake, he thought, was to try to deduce an ontological and dogmatic explanation of the world from sayings which combined the noblest kind of enthusiasm with the clearest perception of both moral beauty and truth. It is probable that Matthew Arnold, by saying with matchless lucidity and courage what many sincere but bewildered people were thinking, did retain in sympathy with religious ideas a great many desirous souls who had felt themselves confronted by the choice between ecclesiastical dogma and scientific materialism. He induced many semi-thoughtful people to regard the Bible with increased reverence and respect, as an inspiring manual of conduct, instead of abandoning it as an intolerable enigma. It is not, perhaps, a very living message now, because the type of persons to whom he gave consolation have moved into a different region, and are more interested now in problems of social reconstruction. Religious dogma has become a matter which mainly concerns denominational coteries; the words "heresy" and "schism" have lost their sinister consequences, and the tendency is rather to emphasize points of agreement than to ostracize points of dissidence. Indeed, it is almost impossible to reconstruct, even in imagination, the susceptibilities which broke out into flame over *Essays and Reviews*. And it may be said generally that Matthew Arnold helped his generation in the direction of clearness of thought, of facing problems sincerely and without irritability, and away from the peculiarly ecclesiastical product which confuses muddle with mystery, and supposes that the blessing given by the Saviour to Thomas was a blessing on credulity, rather than a tender warning against materialistic self-sufficiency.

The books which people write are interesting, I believe, in so far as they represent their tastes rather than their ambitions. The latter books have generally some pretentious emphasis, which is of rhetoric, not of nature, or some subtle suppression of opinion which makes the fabric insecure. The weakness of such books is that they are written to impress the world; and people who desire to impress the world generally judge it harshly or meanly, perhaps because they sus-

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pect that their triumph implies the world's gullibility. Few poets, God be praised, have ever written in that spirit, even though they may yield to complacency afterward. Matthew Arnold's poems were certainly not written from that point of view. He published both his first volumes, *The Strayed Reveller* (1849) and *Empedocles on Etna* (1852) under the single initial "A." Both books fell so flat that they were withdrawn from circulation after a few copies had been sold. If he had lived entirely for ambition, that would have been a sharp lesson. I do not intend here to give a critical appreciation of the poems, except in so far as they illustrate character. They made no appeal to popular ears. They are intensely cultured, and have a certain Miltonic stiffness and bareness, in many lines, which require for their apprehension that a reader's taste should have been curbed and enriched by classical training. He made some experiments, notably in a sort of rhythmical prose, with a pulse of meter beating throughout. That it was not wholly successful is perhaps proved by the fact that it has had no imitators, except Mr. Mallock, who, in the *New Republic,* produced a similar poem which, if it had been a genuine work of the poet's, would have been faithfully, and rightly, accepted as a fine poem of the kind. Matthew Arnold wasted time, it may be whispered, in writing a play, "Balder Dead," where much emotion and high poetry are expended on a subject which never seems quite to burst into flame. He wrote a very noble narrative fragment, "Sohrab and Rustum," which is a splendid specimen of the self-conscious and elaborate epic, and touches the springs of life. Perhaps his best work was done in iambic and stanzaic lyrics, mostly of a gnomic type, full of finely crystallized maxims; while the romantic poem of the "Scholar-Gypsy" and the monody "Thyrsis," on the death of Clough, have taken rank among the great poems of the century. But the poems, as a whole, illustrate a melancholy habit of mind. Occasionally there are hints of a mournful passion, not sensuous, but spiritual, which seems held in check by a certain timidity and coldness of nature which dares not let itself go. The impression they give is that of a mind ill at ease, with an intense love of beauty, a desire for heightened living and zest, struggling with a nature which is hardly robust enough to live as it longs to live. Here, one says, is a spirit that feels the weariness more than the joy of life, and that checks itself again and again

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on the threshold of experience, trying to school itself into tranquillity and philosophical peace.

The hand that wrote

> "Calm's not life's crown, though calm is well,"

must have been that of a man who felt that through some deficiency of vital force he could not afford to gratify his desires, and that his only chance of peace was to accept what he knew to be only second-best—namely, life on a lower plane, husbanded and guarded so that its resources may not be squandered. It is a nature which dreads the fight and the struggle, the elements which to coarser and stronger spirits, who do not trouble themselves about the wounds which they inflict, add zest to the things for which they fight. But there is a nobler quality than that in the background. The nature behind the poems is pre-eminently just, high-minded, and affectionate, born out of due time into a world which is still very far even from its conscious possibilities. The poems reflect an intense love of the earth—not the wild untamed earth of peak and forest, but the earth as subdued and replenished by man. The morality they teach is high and austere. Life is a pilgrimage of which the end is uncertain. There are beautiful things by the way, which the pilgrim sees with hungry heart and tears unsealed; and perhaps some kindly power hangs out signs of love and hope in wayside flowers and forest-aisles. But life, it would seem, must be a constant renunciation, with no hope of immediate reward. Not that men should wilfully abide in sadness—there is work to be done, there are tasks to be performed. If one desires to get the strongest possible contrast to Matthew Arnold, one may consider the poems of his contemporary, William Morris. Both men had the same intense love of man's handiwork. But Morris is full of the joy of life and work, while Arnold gazes mournfully on a life which it is impossible to enjoy, and work which it is unmanly to avoid.

Perhaps one gets nearest to Matthew Arnold's thought in the solemn reflectiveness of *Empedocles on Etna,* where the contrast is heightened by the boy's voice breaking in, like the song of the wayside bird. But to the soul-wearied tortured philosopher, planning a grave flight from a world in which it seems impossible to live wisely and calmly, all that radiant and careless joy is but one of the pathetic fetters which pinion the soul, and which must sternly be broken through.

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The poems all belong to a period of unrest. Life had in store for Matthew Arnold a fuller message. He was to live and thrive, without ever drifting into comfortable materialism. He was to enrich the world by his gentle irony, his temperate example, his unsuspicious candor, and by the sweet reasonableness which he practised as well as preached. But the poetical impulse left him, not probably because he was busy, but because, as has befallen even the most otiose of poets, the nerves of perception and lyrical expression get dulled by the mere act of living; it becomes not worth while to express in dancing and tinkling measures such very temperate raptures! And so he sank, not into silence indeed, but into the congenial task of pleading more prosaically and directly, with an unreasonable world.

When one comes to survey the life and character of Matthew Arnold, one is struck at once by the curious set of contrasts which it displays. His grand manner, his social brilliance, his love of appearances and high consideration, do not seem to correspond to the extreme homeliness of his letters, which are, perhaps, the tamest documents—for all their goodness and kindness—ever penned by a man of genius: they are so much concerned with the details of life, with the food he ate, the names of the people he met, his trivial adventures, that, taken by themselves, one might imagine them to be the work of a capable, kindly, and intelligent commercial traveler. There is no enthusiasm, no discontent, and an almost total absence of ideas about them. But at least his extreme and deep-seated modesty comes out. He speaks in one passage of the fact that is borne in upon him every year that he lives—that success as a writer is far more a matter of good fortune than genius, surrounded, as every writer is, by hosts of intelligent and capable people, all aiming at the same sort of success. That is a very wise and mellow maxim; but it is the last thing that a casual stranger meeting Matthew Arnold, in all his princely condescension, would have credited him with feeling. Then, too, behind this easy and distinguished life, there looks out from the poems the eager, dissatisfied, unhappy spirit, only craving for peace, and unable by any device to compass it. Yet, looking at the facts, even his overwhelming sorrows—his three sons died in boyhood—seem to have been gently borne. It is difficult to bring all these strands together. There appears at first sight a duality of disposition, a nature that

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agonized in the deeps of thought, and a nature that could live easily and cheerfully in daily life. My own belief is that he was one of those rare spirits who had really disciplined his life into patience and acquiescence out of feverish discontent and limitless dreams. He had realized, as all poets do not realize, that, apart from visions and reveries, there is a very real and simple life of duty and family ties and intellectual enterprise that must be courageously and genially dealt with. He had a very noble and simple nature, incapable of meanness, or suspicion, or resentment. He found, I believe, that the one certain way to misunderstand humanity is by intellectually despising it, and that the life of the mind, prospective as it must be, must not be allowed to interfere with the present and urgent life of the heart. He was not, I think, a sagacious political prophet. The refined Whiggery, which he picked up under Lord Lansdowne, obscured his view, while the constitution of his mind made him incapable of recognizing or sympathizing with the rough and vivid hopes of democracy. His political judgments are, indeed, quite singularly inept. Neither had he any constructive social power. His educational ideals are pedantic and bureaucratic; but he had a real love of his fellow-men and a great tolerance for their weaknesses. If they did not flock into his intellectual fold, he yet was a friend of liberty, and struck some shrewd blows at stupidity, complacency, commercial religion, and vulgarity. And when he was swiftly summoned from the life he loved so well, the world lost not a warrior or a prophet, but a man who had lived faithfully and guilelessly, a wise and tender critic who had held up a faithful mirror to the faults of his time, and had done much to interpret and enforce the beauty and significance of thought and emotion and uplifted life. In one of his poems he says that *esteem* and *function* are the only merits which death allows. And these he had indeed, when his body was laid to rest, of purest quality and in fullest measure.

ARTHUR C. BENSON.

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NEW BOOKS REVIEWED

FICTION

THE NEW MACHIAVELLI. By H. G. WELLS. New York: Duffield & Co., 1911.

H. G. WELLS occasionally writes, we will not say, a great novel, though we were tempted to say that of *Tono-Bungay,* but a big novel. After he has written one he unbends, and writes two or three small ones while he prepares for the next big effort. The big effort in the present case is *The New Machiavelli,* one of Wells's ablest productions, and a book that gives us food for thought. As Mr. Bennet in *Clayhanger,* so Mr. Wells here gives us in all its lamentable ugliness and sordidness the picture of the life of a young Englishman of the lower middle class, but of a young man of intellectual vigor, one who thought in terms of "harbors and shining navies, great roads engineered marvelously, jungles cleared and deserts conquered, the ending of muddle and diseases and dirt and misery, the ending of confusion that wastes human possibilities." If one desired to sum up Mr. Wells's plea in a word one would say that in this book he tried to bring home to our consciences our shocking prodigality with human life and happiness. We are careful of wealth, of forests, of water-supplies, of national glory; we are even beginning here and there to be careful of health. But we waste human beings, and we waste human happiness.

"The line of human improvement and the expansion of human life," writes Mr. Wells, "lies in the direction of education and finer initiatives. If humanity cannot develop an education far beyond anything that is now provided, if it cannot collectively invent devices and solve problems on a much richer, broader scale than it does at present, it cannot hope to achieve any very much finer order or any more general happiness than it now enjoys. . . . If those who have power and leisure now and freedom to respond to imaginative appeals cannot be won to the idea of collective self-development, then the whole of humanity cannot be won to that." Mr. Wells goes on to state in the person of his hero that his general conception of politics is a conception of the constructive imagination working upon the vast complex of powerful people, clever people, enterprising people, influential people, amidst whom power is diffused to-day, to produce that self-conscious, highly selective, open-minded, devoted, aristocratic culture, which seems to be the necessary next phase in the development of human affairs. Human progress, as he sees it, is no longer to be the spontaneous product of crowds of raw minds swayed by elementary needs, but a natural and elaborate result of intricate human interdependencies, of human energy and curiosity liberated and acting at leisure, of human

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passions and motives, modified and redirected by literature and art. In short, Mr. Wells, who was once a Socialist, is now making a strong plea for an aristocracy of brains and talent, with the personal freedom which would be the natural concomitant of such a development. Of the immediate results of such personal freedom he gives us an example in the present story, where the hero sacrifices career, renown, future, and wife to an illicit passion. Mr. Wells does some excellent special pleading in his hero's behalf, but to those older than Mr. Wells there still seems to be no moral law more comprehensive than Kant's: "Let every act be such that it might become a moral law"; there is no desirable freedom which hurts and cripples another. Also one questions whether these passions which men plead for as so necessary to personal development would not offer just as much development if restrained, nobly restrained, for the sake of a more general welfare. At any rate, Mr. Wells's book covers a vast deal of ground: pictures of London suburbs in the last half of the nineteenth century, the political life of to-day, innumerable portraits of men and women, and scenes of social and political life. Mr. Wells brings a brilliant and active mind to his work, but no one more than Mr. Wells suggests the thought that intellect is only one part of a man's endowment, and that there are other and more profound regions in the human soul.

THE PATRICIAN. By JOHN GALSWORTHY. New York: Charles Scribner's Sons, 1911.

The Patrician is a very subtle study in the flaws and limitations of the patrician temperament, and it is the more convincing because it is generous. No one of the present generation of adults has looked at the English gentleman with a keener and more impartial eye than Mr. Galsworthy. From the *Island Pharisees,* the *Man of Property,* the *Country House,* on to this book he has quietly, truthfully, and handsomely portrayed his country people, nothing extenuated nor aught set down in malice.

There may be a little less distinction, a little less of the keen satire for which we have loved Mr. Galsworthy in this volume, but there is undoubtedly an enthralling canvas none the less. Lady Casterley, the grandmother of Lord Miltoun, a little lady in whose personality lay the tremendous force of accumulated decision, "the inherited assurance of one whose prestige had never been questioned," is a bit of portraiture as distinctive as a Velasquez, and in another *genre* Susie is as delightful a drawing of childhood. As against the doubting and dissembling loves of Miltoun and Mrs. Noel we have the less painful affair of Lady Barbara and Courtier. There is something in the picture of Courtier which continually reminds one of Bernard Shaw; one can fancy him in much the same way riding off from a love-affair not too hard hit to renew his interest in the impersonal life.

The Patrician as a story is more nearly a bit of literature than anything in English fiction of this year that has reached us. It has charm, distinction, interest, and gives an intimate glimpse into English political life.

QUEED. By HENRY SYDNOR HARRISON. Boston: Houghton Mifflin Company, 1911.

A book that opens with such gross offenses to the English language and

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to personal taste as does this one can hope for but little mercy from any reviewer with standards in either matter.

The first few pages supply us with the following excerpts:

"She had enough height to save that, but it was the narrowest sort of a squeak."

"Semple and West's was understood to be cleaning up a tolerable lot of money per annum."

"The homeward march of tired humans" (an unpardonable and offensive mistake, however newspaper use may sanction it).

He "was no shakes at crossing streets."

"The fire-alarm thing scared him crazy" (supposed to be the speech of a well-bred lady).

"Who under heaven reads Comte nowadays?" "Not me" (the well-bred lady again).

"Your dog ran amuck and began butting perfect strangers all over the place."

"You could make the money," says a young lady to a casual acquaintance, "and let me spend it for you."

And he:

"You'd want nothing better than to curtsy and kowtow where I flung out a gracious order."

Doubtless the author and publisher's reader felt that this style lent vivacity to the book. To the reviewer it lent nothing but momentary disgust and a great unwillingness to continue the volume. "Why is it," asked a distinguished foreign critic, "that all American novels are common—common spelled with a capital 'C' and then italicized and stressed?" The volume under discussion really throws a light on the question. It is easy to see that the book is the product of a culture bred upon newspapers and an æsthetic sense derived from a prolonged experience of third-rate boarding-houses.

Even the great Keats, with his exquisite sensibility for the figures on Grecian vases—seen, alas! only in a book of prints—once or twice describes a red and black table-cloth, a diamond jar, and a love who, like "a milk-white lamb, bleats for man's protection." Such flaws were the price he paid for being born an apothecary's assistant and living in the Early Victorian era. Also one can forgive anything to a man who reminds us of the "surgy murmurs of the lonely sea," and who says, "Darkling I listen!" The present author's highest flight of imagination in the matter of interior decoration is a "pretty, turkey-red table-cloth." To say all the worst things at once and have it over, the novel is made up of a newspaper view of life. The wit is much on the order of the tidbits entitled "Reflections of a Bachelor" which occupy a small space each Sunday in some papers. Such charming and original gems as:

"Her face . . . had in its time given pleasure to the male sex and some food for critical conversation to the female."

"No matter how well a woman looks to the untrained or man's eye, she can always put in some time pleasurably fixing her hair in the back."

"Fixing her hair," although to fix usually means to fasten and render motionless, is a favorite phrase of the author's as well as a favorite occupation of his heroines. Enough! The book has a great deal in common with the comic supplement and pink pictures of certain Sunday editions,

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and since these editions sell widely, so also, doubtless, will this book. The surprising thing is that a firm of its publisher's standing should be upholding it with so great enthusiasm. The book is underbred from cover to cover. It is compact of provincial outlook, vulgar tone, flippant thinking, and sordid living.

There is no offense against morals in the book. Indeed, it is almost pathetic to realize what fair and decent morals may go hand in hand with execrable taste, imperfect acquaintance with the mother tongue, and vapid sentimentality. When sordid and common life is set down in all its sorrowful truth and careful detail by a man who knows it for what it is, as was done by Arnold Bennett in *Clayhanger,* or by Sudermann in *Das Hohe Lied,* or by Maupassant in *Une Vie,* it performs a function. It purges our hearts by means of pity, if not of terror. But set down by one who evidently feels it a goal, an ideal, a fair transcription, it can do nothing but lower all ideals.

One often feels in comparing our own fiction with foreign fiction that wickedness may have its purpose. The Middle Ages were full of wickedness, murder, bloodshed, wars, but also full of the great purging spiritual virtues. High emotions wait upon great actions, good or bad, and out of sorrow and remorse comes renewal of spirit. But what is to come out of sordid twaddle and jejune sentimentality?

THE COLONEL'S STORY. By MRS. ROGER A. PRYOR. New York: The Macmillan Company, 1911.

It is pleasant to turn from a book like *Queed* to a book like *The Colonel's Story.* It is like emerging from the fly-specked dining-room of a fifth-rate boarding-house into a lady's drawing-room. One breathes more freely, and one remembers that there is still a remnant in our land of the old and high régime; a day when ladies spoke and behaved like ladies and when, as the Colonel told the little Dorothea, her motto was *noblesse oblige,* and "that means that she is called upon to deny herself many things allowed humbler people and be at all times high and noble."

The Colonel's Story is a simple tale of old Virginia homes and manners and of an old Virginia gentleman who broke his heart because he loved a fair lady who loved another. It may not be a true tale, for long ago a good authority upon human life told us that "men have died, but not for love." But it is not for the story that we welcome this charming book by Mrs. Pryor. It is for its atmosphere, its high and noble breeding, its beautiful spirit, its historic value. It gives us a vivid picture of that lovely country of Virginia "befo' de wah." Was it ever as poetic, as ideal, as lovely as it lives now in the memories of those whose childhood days were then? Perhaps the very fact that the sordid details have been glossed over by time adds truth to the essential picture. At least we can say, "Here were the ideals of a certain race and a certain era." Our own land offers nothing lovelier.

Mrs. Pryor's power of characterization is excellent. Her characters—Anne Page, Shirley and Dorothea Berkeley, the Colonel, the doctor, Douglas Newton—all stand out and have reality and individuality. Her wit is sprightly and graceful and she has everywhere the great, the indefinable, the

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much-harped-on quality—charm. Who would be introduced to Virginia of the old régime is fortunate to live in the day when Mrs. Roger Pryor can still perform the introduction.

THE LEGACY. By MARY S. WATTS. New York: The Macmillan Company, 1911.

This is a book to treat with seriousness and respect. Our democracy has cultivated in us a certain distrust for fine words and an accompanying reverence for all facts. To such tendencies in our development Mrs. Watts contributes. She speaks of her heroine as "cool-hearted and cool-minded," and only a very restrained and cool-minded author could have created Letty. We have to deal here with a sophisticated writer who has a firm sense of reality, a moral abhorrence of romantic heightening and sentimentality, a *flair* for fact. Letty is the offshoot of a degenerate aristocracy; one of those American families inordinately proud of themselves without very weighty reasons; a tribe given to fine words and elaborate manners, yet not above borrowing money with no particular surety as to eventual payment or above scraping through life with the minimum of effort. Letty has in her another strain. She is pre-eminently self-respecting. She does not prefer hard work, but she prefers it to dependence upon those upon whom she has no claim. Her "legacy" is an old portrait of a great-great-aunt whose name is never breathed in the family because there is some scandal and a separation from her husband connected with it. A curious likeness between Letty and the portrait of the naughty ancestress exists, and in Letty's mind there is always a quiet comparison between her own character and that of the lady of the portrait. Circumstances save Letty from the grosser sins, but she herself faces firmly the unadorned facts that she married her first husband for a home, her second husband for money and comfort. Also she considered the possibility of being faithless to the first husband, although she stopped short of the deed. On the other hand, she worked hard; she earned her living honorably when she had to; she was kind and fair, and cultivated justice, fortitude, and endurance. She had the virtues of strength and sophistication. She knew herself and never saw herself in a haze of romantic glamour. Because she knew herself she was merciful to others.

This is a new type of heroine, born of our deep-rooted reverence for facts. We feel no glow of emotion about her, but we know she would be comfortable to live with and honest in her dealings. Perhaps people are looked at more and more to-day as factors in the great social organism, and in such organism none could say that Letty would be a destructive or inimical factor.

The key-note of Mrs. Watts's style is restraint and quietude. She draws her characters firmly and without partiality. "So they moved before my vision" she would seem to say, "and just what I saw without prejudice and without passion that I give to you again."

DER NARR IN CHRISTO-EMANUEL QUINT. By GERHART HAUPTMANN. Berlin: S. Fischer, 1910.

Few poets of modern Germany have reflected in their works the dualism of their souls as clearly as Gerhart Hauptmann. He has faithfully tried

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to reconcile his idealism, which is inherent, with the naturalism of his works, which is adventitious. But no motive rings more persistently through his works than that of the Christ-love for his fellow-beings, of pity for the needy and the sorrowing. Upon this sentiment was founded the short story called *Der Apostel* which was published fifteen years ago; it became the key-note of what may be considered his greatest work, *Hannele;* it called forth the best work of his gradual decadence, *Der Arme Heinrich,* and it has become the theme of his first long novel, *Der Narr in Christo-Emanuel Quint.*

The story of the hero, an innocent dreamer so filled with the spirit of Christ as to seek instinctively the realization of His kingdom upon earth, is native to the soil of the poet's province. Shut in from childhood in the dingy walls of his wretched hut with no one around him but his family, slaves of the loom as himself, the Silesian weaver drifts into an introspection which breeds religious exaltation. The Bible being the only book in his possession, he imbibes its contents until its world is more real and familiar to him than the world outside, to him remote and intangible. Thus has the poet himself indicated the forces that shape characters like Emanuel Quint and summed up the facts that inspired him to write that story. From the day when the pale, freckled youth first mounts a rock in the market-place of a little hamlet to preach to the populace, warning the wealthy not to abuse their power over the poor and consoling the latter with the coming of the kingdom when all would be brothers and sisters, the career of Hauptmann's hero is that of a visionary, seeking naught but a far-off goal sacred to him, but abhorrent to the multitude. Like all dreamers, he finds disciples and the miracles he works, innocent manifestations of magnetic or hypnotic powers that always have a touch of mystery, make converts all along the course of his peregrinations through the country. There are those that flock to him because of their spiritual affinity to the pious dreamer, those that seek him from curiosity, and those that come merely to bask in the sun of his popularity, and when it sets abandon him. Like all champions of new and strange creeds, he encounters violent opposition both from the hair-splitting sectarian differing from him in details and from the established church condemning him on general principles.

These varied experiences furnish the episodes of the plot. This plot, however, is mainly concerned with the growth of the hero's consciousness of his mission beginning as a mere tool of the Christ spirit to his ultimate weak declaration at the moment of his defection that he is Christ himself. Hauptmann does not spare his hero the temptations of the flesh, but in relating such incidents is singularly discreet. True to the exalted ideal that inspires Emanuel Quint, he remains throughout the story a Galahad. Nor does the poet ignore the pathological view that can be taken of his state of mind. But he only suggests it in the reflections of some physicians who have had an opportunity to observe his hero and are eager to enroll and label him according to some formula of Nordau, Lombroso, or Krafft-Ebing. The portrayal of the character has not one false note; it is throughout admirably consistent. So is the record of Emanuel Quint's fate, logically culminating in his imprisonment on the charge of an atrocious crime committed by one of his converts; his aimless wanderings after he has been discharged and his final disappearance in the eternal snows of the Alps.

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In the ups and downs of Gerhart Hauptmann's career this work means a high-water mark. Would it had not been followed by such a revolting relapse into unrelieved naturalism as that of his Berlin tragi-comedy "Ratten," which presents nothing but scenes of utter depravity and sordidness. For *Der Narr in Christo* is a well-balanced and well-rounded work with none of the disconcerting traces of haste or indifference which marred his recent plays, giving food to adverse criticism and alarming his admirers. The poet has bestowed evident care even upon the many minor characters of this book. His portrait of Bohemian Joe, a filthy, thievish individual of curiously primitive religious instincts, is an excellent specimen of his gift of characterization. The description of the rickety hut in the mountains on the boundary of Prussia and Austria, the hiding-place of smugglers and other lawbreakers, and the pictures of poverty and misery among the drudging, starving weavers—all these are naturalistic in manner, but not repulsive. Nor has the poet failed to offset them by scenes of a more idyllic character, as those in the parson's and the teacher's homes. Occasionally he has even struck a note of genuine humor, as in the encounter of Emanuel Quint and his disciples with a boorish, though good-natured, tourist resenting their solemn demeanor. The spirit of the book is profoundly serious and sincere, and the language has the rhythm of noble dignity. The work is proof of earnest artistic endeavor in the service of a great ethical purpose, and with *Hannele* establishes Gerhart Hauptmann's position in the world of German letters as more than merely a literary quantity.

OBERLIN. By FRITZ LIENHARD. Stuttgart, Grenier & Pfeiffer, 1910.

That Fritz Lienhard, who some years ago attempted to counteract the growing cosmopolitanism of the young generation by pleading for a literature indigenous to the soil, should sometime himself write a book distinctly racy in quality, was to be expected. But that the champion of this *Heimatskunst*, whose work as critic and as editor is of so much greater merit than his poems and his plays, would give us a work of fiction, so cleverly woven out of threads of biography and history as to form a real *Kulturroman*, a novel picturing a cultural epoch, has come as a surprise even to his admirers.

Lienhard's *Oberlin* is a story of the French Revolution as it affected his native province, and its spiritual center the noted teacher and divine whose name survives in an American college and in a measure may have inspired its work. Not directly an actor in the drama of human destinies set against this interesting background, Oberlin is rather an indirect power guiding the actions of other *dramatis personæ*. The real hero of the novel is a young pedagogue tutoring the sons of a nobleman, and in this capacity coming into contact with the society of rank, wealth, and culture. The center of the circle at Birkenweier is the blind poet Pfeffel; friends of Goethe are among the visitors, and out of frequent references to illustrious contemporaries the reader gets, as in a distant perspective, a view of the intellectual life of Germany at that period. In conversation with his young friends Pfeffel calls attention to the simultaneous appearance of men whose mission is to give the rising generation spiritual truths. For he had been born in 1736, four years before the year that gave birth to the poets Claudius and Jacobi, to the mystic Jung-Stilling, to the preacher and

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physiognomist Lavater and to Oberlin; and five years later were born the educators Campe and Pestalozzi. Thus while in France the revolution was attempting to regenerate the State, these Germans, Swiss, and Alsatians were absorbed in the spiritual regeneration of the individual.

This statement of the poet, now long forgotten with other minor lights of German classicism, is the burden of the book. Not from without, but from within, comes real growth to the individual, as to society. Although the hero owes much to the charming French marquise who first made him forget class distinctions and made him feel his worth as a human entity in aristocratic Birkenweier, and although his democratic consciousness was greatly strengthened during his historical studies in Jena under Schiller and his life in revolutionary Strassburg, the power that determines his attitude toward the problems of his time and brings maturity and stability to his wavering irresolute mind, is Oberlin. This ideal pastor, in whose haven of rest at Steintal those characters of the story reassemble who have survived the tempest of the revolution and found consolation for the defection of personal ambitions in social and political ideals, has all the time stood above partisan strife. He seeks a reconciliation of aristocracy and democracy upon a more spiritual plane of existence. This idea differentiates the book from other historical fiction dealing with the great Revolution. The Alsatians were at heart loyal to the monarchy, though not blind to its mistakes. They wanted not a republic, but a constitutional monarchy. Thus they condemned absolutism as emphatically as radicalism. The figure of Dietrich, the mayor of Strassburg, intellectual, versatile, progressive, but unable to follow the revolutionary current to its ultimate end, is so sympathetically and strongly outlined as to leave a lasting impression in the reader's mind.

Out of the turbulent sea of humanity that surges through this part of the book a variety of clearly defined figures stands out with remarkable force. Religious, social, and political dissensions have sharpened the features, individualized even commonplace types. The hero's Protestant father, a gardener of radical opinions, has a violent clash with his tenant, a Catholic baker. The reign of terror is presided over by a whilom priest, a splendid portrait of a demagogue. The hero himself, the pedagogue, Victor Hartmann, given more to philosophical and ethical meditation and to didactic discourse than to action, obeys the call to arms and works out his salvation in the tumult of the times. When he arrives at Steintal the reader feels that this had been his destination through all the years of his development. In his portraits of women Leinhard is less successful. With the exception of the marquise, who is a fascinating embodiment of the high-strung emotionalism and the elastic morality of the period, the women are not strongly enough individualized, those of the same rank bearing an unfortunate family resemblance. But they are all limned with sympathy, if not with insight, into their finer and less apparent qualities.

The style of Lienhard is remarkably plastic. In the idyllic still life of Birkenweier, with its innocent flirtations and its exalted friendships, it reaches an almost lyrical note; in the scenes at Strassburg it is of a forcible realism. The story stands apart from contemporary German fiction not only by its sane conservatism, but also by the even rhythm and almost impersonal tenor of the narrative. It conveys a picture of Alsace in the Revolution through the lens of modern classicism.

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"UNDER WESTERN EYES"*

BY JOSEPH CONRAD

CHAPTER XI

RAZUMOV, thus left to himself, took the direction of the gate. But on this day of many conversations he discovered that very probably he could not leave the grounds without having to hold another one.

Stepping in view from beyond the lodge appeared the expected visitors of Peter Ivanovitch in a small party composed of two men and a woman. They noticed him, too, immediately, and stopped short as if to consult. But in a moment the woman, moving aside, motioned with her arm to the two men, who, leaving the drive at once, struck across the large neglected lawn, or rather grass-plot, and made directly for the house. The woman remained on the path, waiting for Razumov's approach. She had recognized him. He, too, had recognized her at the first glance. He had been made known to her at Zurich, where he had broken his journey while on his way from Dresden. They had been much together for the three days of his stay.

She had on the very same costume in which he had seen her first. A blouse of crimson silk made her noticeable at a distance. With that she wore a short brown skirt and a leather belt. Her complexion was the color of coffee and milk, but very clear; her eyes black and glittering, her figure erect. A lot of thick hair, nearly white, was done up loosely under a dusty Tyrolese hat of dark cloth which seemed to have lost some of its trimmings.

The expression of her face was grave, intent; so grave that Razumov, after approaching her close, felt obliged to smile. She greeted him with a manly hand-grasp.

"What! Are you going away!" she exclaimed. "How is that, Razumov?"

"I am going away because I haven't been asked to stay," Razumov answered, returning the pressure of her hand with much less force than she had put into it.

She jerked her head sideways like one who understands. Meantime Razumov's eyes had strayed after the two men. They were crossing the grass-plot obliquely without haste, looking straight before them at the house. The shorter of the two was buttoned up in a narrow overcoat of some thin gray material which came nearly to his heels. His companion, much taller and broader, wore a short close-fitting jacket, and tight trousers tucked into shabby top-boots.

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The woman, who had sent them out of Razumov's way, apparently, spoke in a businesslike voice.

"I had to come rushing from Zurich on purpose to meet the train and take these two along here to see Peter Ivanovitch. I've just managed it."

"Ah! indeed," Razumov said, perfunctorily, and very vexed at her staying behind to talk to him. "From Zurich—yes, of course. And these two, they come from . . ."

She interrupted without emphasis:

"From quite another direction. From a distance, too. A considerable distance."

Razumov shrugged his shoulders. The two men from a distance, after having reached the wall of the terrace, disappeared suddenly at its foot as if the earth had opened to swallow them up.

"Oh, well, they have just come from America." The woman in the crimson blouse shrugged her shoulders too a little before making that statement. "The time is drawing near," she interjected, as if speaking to herself. "I did not tell them who you were. Yakovlitch would have wanted to embrace you."

"Is that he, with the wisp of hair hanging from his chin, in the long coat?"

"You've guessed aright. That's Yakovlitch."

"And they could not find their way here from the station without you coming on purpose from Zurich to show it to them. Verily, without women we can do nothing. So it stands written and apparently so it is."

He was conscious of an immense lassitude under his effort to be sarcastic. And he could see that she had detected it with those steady brilliant black eyes.

"What is the matter with you?"

"I don't know. Nothing. I've had a devil of a day. All day long."

She waited with her black eyes fixed on his face. Then:

"What of that? You men are so impressionable and self-conscious. One day is like another, hard, hard, and there's an end of it till the great day comes. I came over for a very good reason. They wrote to warn Peter Ivanovitch of their arrival. But where from? Only from Cherbourg on a bit of ship's note-paper. Anybody could have done that. Yakovlitch has lived for years and years in America. I am the only one at hand who had known him well in the old days. I knew him very well indeed. So Peter Ivanovitch telegraphed asking me to come. It's natural enough, is it not?"

"You came to vouch for his identity?" inquired Razumov.

"Yes; something of the kind. Fifteen years of a life like his make changes in a man. Lonely like a crow in a strange country. When I think of Yakovlitch before he went to America—"

The softness in the low tone of these words caused Razumov to glance at her sideways. The black eyes were looking away; she had plunged the fingers of her right hand deep into the mass of nearly white hair and stirred them there absently. When she withdrew her hand the little hat perched on the top of her head remained slightly tilted, with a queer inquisitive effect, contrasting strongly with the reminiscent murmur that escaped her.

"We were not in our first youth even then. But a man is a child always."

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Razumov thought suddenly, "They have been living together." Then aloud:

"Why didn't you follow him to America?" he asked, point-blank.

She looked up at him with a perturbed air.

"Don't you remember what was going on fifteen years ago? It was a time of activity. The revolution has its history by this time. You are in it and yet you don't seem to know it. Yakovlitch went away then on a mission; I went back to Russia. It had to be so. Afterward there was nothing for him to come back to."

"Ah, indeed," muttered Razumov, with affected surprise. "Nothing!"

"What are you trying to insinuate?" she exclaimed, quickly. "Well, and what then if he did get discouraged a little? . . ."

"He looks like a Yankee with that goatee hanging from his chin. A regular Uncle Sam," growled Razumov. "Well, and you? You who went to Russia? You did not get discouraged."

"Never mind. Yakovlitch is a man who cannot be doubted. He, at any rate, is the right sort."

Her black, penetrating gaze remained fixed upon Razumov while she spoke and for a moment afterward.

"Pardon me," Razumov inquired, coldly, "but does it mean that you, for instance, think that I am *not* the right sort?"

She made no protest, gave no sign of having heard the question; she continued looking at him in a manner which he judged not to be absolutely unfriendly. In Zurich, when he passed through, she had taken him under her charge in a way, and was with him from morning till night during his stay of two days. She took him round to see several people. At first she talked to him a great deal and rather unreservedly, but always avoiding strictly any reference to herself; toward the middle of the second day she fell silent, attending him zealously as before and even seeing him off at the railway station, where she pressed his hand firmly through the lowered carriage window and, stepping back without a word, waited till the train moved. He had noticed that she was treated with quiet regard. He knew nothing of her parentage, nothing of her private history or political record; he judged her from his own private point of view as being a distinct danger in his path. Judged is not, perhaps, the right word. It was more of a feeling, the summing up of slight impressions aided by the discovery that he could not despise her as he despised all the others. He had not expected to see her again so soon.

No, decidedly; her expression was not unfriendly. Yet he perceived an acceleration in the beat of his heart. This conversation could not be abandoned at that point. He went on in accents of scrupulous inquiry.

"Is it, perhaps, because I don't seem to accept blindly every development of the general doctrine—such, for instance, as the feminism of our great Peter Ivanovitch? If that is what makes me suspect, then I can only say I would scorn to be a slave even to an idea."

She had been looking at him all the time, not as a listener looks at one, but as if the words he chose to say were only of secondary interest. When he finished she slipped her hand, by a sudden and decided movement, under his arm and impelled him gently toward the gate of the grounds. He felt her firmness and obeyed the impulsion at once just as the other two men had a moment before obeyed unquestioningly the wave of her hand.

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They made a few steps like this.

"No, Razumov, your ideas are probably all right," she said. "You may be valuable—very valuable. What's the matter with you is that you don't like us."

She released him. He met her with a frosty smile.

"Am I expected then to have love as well as convictions?"

She shrugged her shoulders.

"You know very well what I mean. People have been thinking you not quite whole-hearted. I have heard that opinion from one side and another. But I have understood you at the end of the first day . . ."

Razumov interrupted her, speaking steadily.

"I assure you that your perspicacity is at fault here."

"What phrases he uses!" she exclaimed, parenthetically. "Ah, Kirylo Sidorovitch, you like other men are fastidious, full of self-love and afraid of trifles. Moreover, you had no training. What you want is to be taken in hand by some woman. I am sorry I am not staying here a few days. I am going back to Zurich to-morrow and shall take Yakovlitch with me most likely."

This information relieved Razumov.

"I am sorry, too," he said. "But, all the same, I don't think you understand me."

She released his arm. He breathed more freely; but at the last moment she asked:

"And how did you hit it off with our Peter Ivanovitch? You have seen a good deal of each other. How is it between you two?"

Not knowing what answer to make, the young man inclined his head slowly.

Her lips had been parted in expectation. She pressed them together and seemed to reflect.

"That's all right."

This had a sound of finality, but she did not leave him. It was impossible to guess what she had in her mind. Razumov muttered.

"It is not me that you should have asked that question. In a moment you shall see Peter Ivanovitch himself and the subject will come up naturally. He will be curious to know what has delayed you so long in this garden."

"No doubt Peter Ivanovitch will have something to say to me. Several things. He may even speak of you—question me. Peter Ivanovitch is inclined to trust me generally."

"Question you? That's very likely."

She smiled half serious.

"Well—and what shall I say to him?"

"I don't know. You may tell him of your discovery."

"What's that?"

"Why—my lack of love for . . ."

"Oh, that's between ourselves," she interrupted; it was hard to say whether in jest or earnest.

"I see that you want to tell Peter Ivanovitch something in my favor," said Razumov, with grim playfulness. "Well, then you could tell him that I am very much in earnest about my mission. I mean to succeed."

"You have been given a mission," she exclaimed, quickly.

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"It amounts to that. I have been told to bring about a certain event."

She looked at him searchingly.

"A mission," she repeated, very grave and interested all at once. "What sort of mission?"

"Something in the nature of propaganda work."

"Ah! Far from here?"

"No, not very far," said Razumov, restraining a sudden desire to laugh, though he did not feel joyous in the least.

"So," she said, thoughtfully. "Well, I am not asking questions. It's sufficient that Peter Ivanovitch should know what each of us is doing. Everything is bound to come right in the end."

"You think so?"

"I don't think, young man; I just simply believe it."

"And is it to Peter Ivanovitch that you owe that faith?"

She did not answer the question, and they stood idle, silent, as if reluctant to part from each other.

"That's just like a man," she murmured at last. "As if it were possible to tell how a belief comes to one." Her thin Mephistophelian eyebrows moved sinuously a little. "Truly, there are millions of people in Russia who would envy the life of dogs in this country. It is a horror and a shame to confess that even between ourselves. One must believe for very pity. This can't go on. No, it can't go on. For twenty years I have been coming and going, looking neither to the left nor to the right. . . . What are you smiling to yourself for? You are only at the beginning. You have begun well, but you just wait till you have trodden every particle of yourself under your feet in your comings and goings. For that is what it comes to. You've got to trample down every particle of your own feelings; for to stop you cannot, you must not. I have been young, too—but perhaps you think that I am complaining—eh?"

"I don't think anything of the sort," protested Razumov, indifferently.

"I dare say you don't, you dear superior creature. You don't care."

She plunged her fingers into the bunch of hair on the left side and that brusque movement had the effect of setting the Tyrolese hat straight on her head. She frowned under it without animosity, in the manner of an investigator. Razumov averted his face carelessly.

"You men are all alike. You mistake luck for merit. You do it in good faith, too. I would not be too hard on you. It's masculine nature. You men are ridiculously pitiful in your aptitude to cherish childish illusions down to the very grave. There is a lot of us who have been at work for fifteen years—I mean constantly—trying one way after another, underground and aboveground, looking neither to the right nor to the left. I can talk about it. I have been one of those that never rested. There! What's the use of talking. Look at my gray hairs. And here two babies come along—I mean you and Haldin—you come along and manage to strike a blow at the first try."

At the name of Haldin falling from the rapid and energetic lips of the woman revolutionist Razumov had the usual brusque consciousness of the irrevocable. But in all the months which had passed over his head he had become hardened to the experience. The consciousness was no longer accompanied by the blank dismay and the blind anger of the early days. He had argued himself into new beliefs; and he had made for himself a

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mental atmosphere of gloomy and sardonic reverie, a sort of murky medium through which the event appeared like a featureless shadow having vaguely the shape of a man extremely familiar, yet utterly inexpressive except for its air of discreet waiting in the dusk. It was not alarming.

"What was *he* like?" the woman revolutionist asked, unexpectedly.

"What was he like?" repeated Razumov, making a painful effort not to turn upon her savagely. But he relieved himself by laughing a little, while he stole a glance at her out of the corners of his eyes. She looked disturbed by this reception of her inquiry.

"How like a woman!" he went on. "What is the good of concerning yourself with his appearance? Whatever it was, he is removed beyond all feminine influences now."

A frown making three folds at the root of her nose accentuated the Mephistophelian slant of her eyebrows.

"You suffer, Razumov," she suggested in her low, confident voice.

"What nonsense!" Razumov faced the woman fairly. "But now I think of it, I am not sure that he is beyond the influence of one woman at least. The one over there—Madame de S——, you know. Formerly the dead were allowed to rest, but now it seems they are at the beck and call of a crazy old harridan. We revolutionists make wonderful discoveries. It is true that they are not exactly our own. We have nothing of our own. But couldn't the friend of Peter Ivanovitch satisfy your feminine curiosity? Couldn't she conjure him up for you?" he jested like a man in pain.

Her concentrated frowning expression relaxed and she said, a little wearily: "Let us hope she will make an effort and conjure up some tea for us. But that is by no means certain. I am tired, Razumov."

"You tired! What a confession! Well, there has been tea up there. I had some. If you hurry on after Yakovlitch, instead of wasting your time with such an unsatisfactory sceptical person as myself, you may find the ghost of it—the cold ghost of it—still lingering in the temple. But as to you being tired, I can hardly believe it. We are not supposed to be. We mustn't. We can't. The other day I've read in some paper or other an alarmist article on the tireless activity of the revolutionary parties. It impresses the world. It's our prestige."

"He flings out continually these flouts and sneers." The woman in the crimson blouse spoke as if appealing quietly to a third person, but her black eyes never left Razumov's face. "And what for, pray? Simply because some of his conventional notions are shocked, some of his petty masculine standards. A true man's childishness. You might think he was one of those nervous sensitives that come to a bad end. And yet," she went on, after a short reflective pause and changing the mode of her address, "and yet I know something which makes me think you are a man of character, Kirylo Sidorovitch. Yes, indeed—I know."

There was something mysteriously positive in this assertion which startled Razumov. Their eyes met. He looked away and through the bars of the rusty gate stared at the clean, wide road shaded by the leafy trees. An electric tram-car, quite empty, ran past the gate with a metallic rustle. It seemed to him he would have given anything to be sitting inside all alone. He was inexpressibly weary, weary in every fiber of his body, but he had a reason for not being the first to break off the conversation.

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It would not be sound diplomacy. And there was his task—his ordeal. At any instant, in the visionary and criminal babble of revolutions, some momentous words might fall on his ear; from her lips, from anybody's lips. As long as he managed to preserve a clear mind and to keep down his irritability there was nothing to fear. The only condition of success and safety was indomitable will power, he reminded himself.

He longed to be on the other side of the bars, as though he were actually a prisoner within the grounds of this center of revolutionary plots, of this house of folly, of blindness, of villainy and crime. Silently he indulged his wounded spirit in a feeling of an immense moral and mental remoteness. He did not even smile when he heard her repeat the words,

"Yes, a strong character."

He continued to gaze through the bars like a moody prisoner, not thinking of escape, but merely pondering upon the faded memories of freedom.

"If you don't look out," he mumbled, still looking away, "you shall certainly miss seeing as much as the mere ghost of that tea."

She was not to be shaken off in such a way. As a matter of fact, he had not expected to succeed.

"Never mind, it will be no great loss. I mean, the missing of her tea, and only the ghost of it at that. As to the lady, you must understand that she has her positive uses. See *that,* Razumov."

He turned his head at this imperative appeal and saw the woman revolutionist making the motions of counting money into her hand.

"That's what it is. You see?"

Razumov uttered a slow "I see" and returned to his prisoner-like gazing upon the neat and shady road.

"Material means must be obtained in some way and this is easier than breaking into banks. More certain, too. There! I am joking. . . . What is he muttering to himself now?" she cried, under her breath.

"My admiration of Peter Ivanovitch's devoted self-sacrifice, that's all. It's enough to make one sick."

"Oh, you squeamish, masculine creature! Sick. Makes him sick. And what do you know of the truth of it? There's no looking into the secrets of the heart. Peter Ivanovitch knew her years ago in his worldly days when he was a young officer in the Guards. It is not for us to judge an inspired person. That's where you men have an advantage. You are inspired sometimes both in thought and action. I have always admitted that when you *are* inspired, when you manage to throw off your masculine cowardice and prudishness, you are not to be equaled by us. Only how seldom! . . . Whereas the silliest woman can always be made of use. And why? Because we have passion, unappeasable passion. . . . I should like to know what he is smiling at?"

"I am not smiling," protested Razumov, gloomily.

"Well, how is one to call it? You made some sort of face. Yes, I know. You men can love here and hate there and desire something or other—and you make a great to-do about it and you call it passion. Yes, while it lasts. But we women are in love with love, and with hate, with these very things I tell you, and with desire itself. That's why we can't be bribed off so easily as you men. In life, you see, there is not much choice for one. You have either to rot or to burn. And there is not one of us, painted or unpainted, that would not rather burn than rot."

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She spoke with energy, but in a matter-of-fact tone. Razumov's attention had wandered away on a track of its own—outside the bars of the gate—but not out of earshot. He stuck his hands into the pockets of his coat.

"Rot or burn! Powerfully stated. Painted or unpainted. Very vigorous. Painted or . . . Do tell me. She would be infernally jealous of him, wouldn't she?"

"Who? What? The Baroness? Eleonor Maximovna? Jealous of Peter Ivanovitch? Heavens! are these the questions the man's mind is running on? Such a thing is not to be thought of."

"Why? Can't a wealthy old woman be jealous, or are they all pure spirits together?"

"But what put it into your head to ask such a question?" she wondered.

"Nothing; I just asked. Masculine frivolity, if you like."

"I don't like," she retorted at once. "It is not the time to be frivolous. What are you flinging your very heart against? Or perhaps you are only playing a part."

Razumov had felt that woman's observation of him like a physical contact, like a hand resting lightly on his shoulder. At that moment he received the mysterious impression of her having made up her mind for a closer grip. He stiffened himself inwardly to bear it without betraying himself.

"Playing a part," he repeated, presenting to her an unmoved profile. "It must be done very badly, since you see through the assumption."

She watched him, her forehead drawn into perpendicular folds, the thin black eyebrows diverging upward like the antennæ of the insect. He added, hardly audibly:

"You are mistaken. I am doing it no more than the rest of us."

"Who is doing it?" she snapped out.

"Who? Everybody," he said, impatiently. "You are a materialist, aren't you?"

"Eh! My dear soul, I have outlived all that nonsense."

"But you must remember the definition of Cabanis: Man is a digestive tube. I imagine now . . ."

"I spit on him."

"What! on Cabinis? All right. But you can't ignore the importance of a good digestion. The joy of life—you know, the joy of life?—depends on a sound stomach, whereas a bad digestion inclines one to scepticism, incredulity, breeds black fancies and thoughts of death. These are facts ascertained by physiologists. Well, I assure you that ever since I came over from Russia I have been stuffed with indigestible foreign concoctions of the most nauseating kind—pah!"

"You are joking," she murmured, incredulously. He assented in a detached way.

"Yes, it is all a joke. It's hardly worth while talking to a man like me. Yet for that reason men have been known to take their own life."

"On the contrary, I think it *is* worth while talking to you."

He kept her in the corner of his eye. She had plunged her fingers in the loose hair at the side of her head and was stirring them thoughtfully.

She seemed to be thinking out some scathing retort, but ended by only shrugging her shoulders slightly.

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"Shallow talk! I suppose one must pardon this weakness in you," she said, putting a special accent on the last word. There was something anxious in her indulgent conclusion.

Razumov noted the slightest shades in this conversation, which he had not expected, for which he was not prepared. That was it. "I was not prepared," he said to himself. "It has taken me unawares." It seemed to him that if he only could allow himself to pant openly like a dog for a time this oppression would pass away. "I shall never be found prepared," he thought, with despair. He laughed a little, saying as lightly as he could:

"Thanks. I don't ask for mercy." Then affecting a playful uneasiness, "But aren't you afraid Peter Ivanovitch might suspect us of plotting something unauthorized together by the gate here?"

"No, I am not afraid. You are quite safe from suspicions while you are with me, my dear young man." The humorous gleam in her black eyes went out. "Peter Ivanovitch trusts me," she went on, quite austerely. "He takes my advice. I am his right hand, as it were, in certain most important things. That amuses you—what? Do you think I am boasting?"

"God forbid. I was just only saying to myself that Peter Ivanovitch seems to have solved the woman question pretty completely."

Even as he spoke he reproached himself for his words, for his tone. All day long he had been saying the wrong things. It was folly, worse than folly. It was weakness; it was this disease of perversity overcoming his will. Was this the way to meet speeches which certainly contained the promise of future confidences from that woman who apparently had a great store of secret knowledge and so much influence? Why give her this puzzling impression? But she did not seem inimical. There was no anger in her voice. It was strangely speculative.

"One does not know what to think, Razumov. You must have bitten something bitter in your cradle."

Razumov gave her a sidelong glance.

"H'm! Something bitter? That's an explanation," he muttered, "only it was much later. And don't you think, Sofia Antonovna, that you and I come from the same cradle?"

The woman whose name he had forced himself at last to pronounce (he had experienced a strong repugnance in letting it pass his lips), the woman revolutionist, murmured after a pause,

"You mean—Russia?"

He disdained even to nod. She seemed softened, her black eyes very still, as though she were pursuing the simile in her thoughts to all its tender associations. But suddenly she knitted her brows in a Mephistophelian frown.

"Yes. Perhaps no wonder, then. Yes. One lies there lapped up in evils watched over by beings that are worse than ogres, ghouls and vampires. They must be driven away, destroyed utterly. In regard to that task nothing else matters if men and women are determined and faithful. That's how I came to feel in the end. The great thing is not to quarrel amongst ourselves about all sorts of conventional trifles. Remember that, Razumov."

Razumov was not listening. He had even lost the sense of being watched in a sort of heavy tranquillity. His uneasiness, his exasperations, his scorn, were blunted at last by all these trying hours. It seemed to him

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that now they were blunted forever. "I am a match for them all," he thought, with a conviction too firm to be exulting. The woman revolutionist had ceased speaking; he was not looking at her; there was no one passing along the road. He almost forgot that he was not alone. He heard her voice again curt, businesslike, and yet betraying the hesitation which had been the real reason of her prolonged silence.

"I say, Razumov!"

Razumov, whose face was turned away from her, made a grimace like a man who hears a false note.

"Tell me: is it true that on the very morning you actually attended the lectures at the university?"

An appreciable fraction of a second elapsed before the real import of the question reached him like a bullet which strikes some time after the flash of the fired shot. Luckily his disengaged hand was ready to grip a bar of the gate. He held it with a terrible force, but his presence of mind was gone. He could make only a sort of gurgling, grumpy sound.

"Come, Kirylo Sidorovitch!" she urged him. "I know you are not a boastful man. *That* one must say for you. You are a silent man. Too silent, perhaps. You are feeding on some bitterness of your own. You are not an enthusiast. You are perhaps all the stronger for that. But you might tell me. One would like to understand you a little more. I was so immensely struck . . . Have you really done it?"

He got his voice back. The shot had missed him. It had been fired at random altogether, more like a signal for coming to close quarters. It was to be a plain struggle for self-preservation. And she was a dangerous adversary, too. But he was ready for battle; he was so ready that when he turned toward her not a muscle of his face moved.

"Certainly," he said, without animation, secretly strung up, but perfectly sure of himself. "Lectures—certainly. But what makes you ask?"

It was she who was animated.

"I had it in a letter written by a young man in Petersburg; one of us, of course. You were seen—you were observed with your note-book, impassible, taking notes. . . ."

He enveloped her with his fixed stare.

"What of that?"

"I call such coolness superb—that's all. It is a proof of uncommon strength of character. The young man writes that nobody could have guessed from your face and manner the part you had played only some two hours before—the great, momentous, glorious part. . . ."

"Oh no; nobody could have guessed," assented Razumov, gravely, "because, don't you see, nobody at that time . . ."

"Yes, yes; but, all the same, you are a man of exceptional fortitude, it seems. You looked exactly as usual. It was remembered afterward with wonder. . . ."

"It cost me no effort," Razumov declared, with the same staring gravity.

"Then it's almost more wonderful still," she exclaimed, and fell silent, while Razumov asked himself whether he had not said there something utterly unnecessary—or even worse.

She raised her head eagerly.

"Your intention was to stay in Russia? You had planned . . ."

"No," interrupted Razumov, without haste. "I had made no plans."

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"You just simply walked away?" She struck it.

He bowed his head in slow assent. "Simply—yes." He had gradually released his hold on the bar of the gate, as though he had acquired the conviction that no random shot could knock him over now. And suddenly he was inspired to add, "The snow was coming down very thick, you know."

She had a slight appreciative movement of the head like an expert in such enterprises, very interested, capable of taking every point professionally. Razumov remembered something he had heard.

"I turned into a narrow side street, you understand," he went on, negligently, and paused as if it were not worth talking about. Then he remembered another detail and dropped it before her like a disdainful dole to her curiosity.

"I felt inclined to lie down and go to sleep there."

She clicked her tongue at that symptom very struck indeed. Then: "But the note-book! The amazing note-book, man! You don't mean to say you had put it in your pocket beforehand!" she cried.

Razumov gave a start. It might have been a sign of impatience.

"I went home. Straight home to my rooms," he said, distinctly.

"The coolness of the man! You dared?"

"Why not? I assure you I was perfectly calm. Ha! calmer than I am now, perhaps."

"I like you much better as you are now than when you indulge that bitter vein of yours, Razumov. And nobody in the house saw you return—eh? That might have appeared queer."

"No one," Razumov said firmly. "Dvornik, landlady, girl, all out of the way. I went up like a shadow. It was a murky morning. The stairs were dark. I glided up like a phantom. Fate? Luck? What do you think?"

"I just see it!" The eyes of the woman revolutionist snapped darkly. "Well—and then you considered. . . ."

Razumov had it all ready in his head.

"No, I looked at my watch, since you want to know. There was just time. I took that note-book and ran down the stairs on tiptoe. Have you ever listened to the pitpat of a man running round and round the shaft of a deep staircase? They have a gaslight at the bottom burning night and day. I suppose it's gleaming down there now. . . . The sound dies out—the flame winks. . . ."

He noticed the vacillation of surprise passing over the steady curiosity of the black eyes fastened on his face as if the woman revolutionist received the sound of his voice into her pupils instead of her ears. He checked himself, passed his hand over his forehead, confused like a man who had been dreaming aloud.

"Where could a student be running if not to his lectures in the morning? At night it's another matter. I did not care if all the house had been there to look at me. But I don't suppose there was any one. It's best not to be seen or heard. Aha! The people that are neither seen nor heard are the lucky ones—in Russia. Don't you admire my luck?"

"Astonishing," she said. "If you have luck as well as determination, then indeed you are likely to turn out an invaluable acquisition for the work in hand."

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Her tone was earnest; and it seemed to Razumov that it was speculative, even as though she were already apportioning him, in her mind, his share of the work. Her eyes were cast down. He waited, not very alert now, but with the grip of the ever-present danger giving him an air of attentive gravity. Who could have written about him in that letter from Petersburg? A fellow-student, surely—some imbecile victim of revolutionary propaganda, some foolish slave of foreign, subversive ideals. A long, famine-stricken, red-nosed figure presented itself to his mental search. That must have been the fellow.

He smiled inwardly at the absolute wrong-headedness of the whole thing, the self-deception of a criminal idealist shattering his existence like a thunder-clap out of a clear sky and re-echoing amongst the wreckage in the false assumptions of those other fools. Fancy that hungry and piteous imbecile furnishing to the curiosity of the revolutionist refugees this utterly fantastic detail! He appreciated it as by no means constituting a danger. On the contrary, as things stood, it was for his advantage rather a piece of sinister luck which had only to be accepted with proper caution.

"And yet, Razumov," he heard the musing voice of the woman, "you have not the face of a lucky man." She raised her eyes with renewed interest. "And so that was the way of it. After doing your work you simply walked off and made for your rooms. That sort of thing succeeds sometimes. I suppose it was agreed beforehand that, once the business over, each of you would go his own way?"

Razumov preserved the seriousness of his expression and the deliberate, cautious manner of speaking.

"Was not that the best thing to do?" he asked in a dispassionate tone. "And, anyway," he added, after waiting a moment, "we did not give much thought to what would come after. We never discussed formally any line of conduct. It was understood, I think."

She approved his statement with slight nods.

"You, of course, wished to remain in Russia?"

"In Petersburg itself," emphasized Razumov. "It was the only safe course for me. And, moreover, I had nowhere else to go."

"Yes, yes; I know clearly. And the other—this wonderful Haldin appearing only to be regretted—you don't know what he intended?"

Razumov had foreseen that such a question would certainly come to meet him sooner or later. He raised his hands a little and let them fall helplessly by his side—nothing more.

It was the white-haired woman conspirator who was the first to break the silence.

"Very curious," she pronounced, slowly. "And you did not think, Kirylo Sidorovitch, that he might perhaps wish to get in touch with you again?"

Razumov discovered that he could not suppress the trembling of his lips. But he thought that he owed it to himself to speak. A negative sign would not do again. Speak he must, if only to get to the bottom of what that Petersburg letter might have contained.

"I stayed at home next day," he said, bending down a little and plunging his glance into the black eyes of the woman so that she should not observe the trembling of his lips. "Yes, I stayed at home. As my actions are remembered and written about, then perhaps you are aware that I

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was *not* seen at the lectures next day. Eh? You didn't know? Well, I stopped at home—the livelong day."

As if moved by his agitated tone, she murmured a sympathetic, "I see! It must have been trying enough."

"You seem to understand one's feelings," said Razumov, steadily. "It was trying. It was horrible: it was an atrocious day. It was not the last."

"Yes, I understand. Afterward when you heard they had got him. Don't I know how one feels after losing a comrade in the good fight! One's ashamed of being left. And I can remember so many. Never mind. They shall be avenged before long. And what is death? At any rate, it is not a shameful thing like some kinds of life."

Razumov felt something stir in his breast, a sort of feeble and unpleasant tremor.

"Some kinds of life," he repeated, looking at her searchingly.

"The subservient, submissive life. Life! No! Vegetation on the filthy heap of iniquity which the world is. Life, Razumov, not to be vile, must be a revolt—a pitiless protest—all the time."

She calmed down; the gleam of suffused tears in her eyes dried out instantly by the heat of her passion, and it was in her capable business-like manner that she went on.

"You understand me, Razumov. You are not an enthusiast, but there is an immense force of revolt in you. I felt it from the first, directly I set my eyes on you—you remember—in Zurich. Oh, you are full of bitter revolt! That is good. Indignation flags sometimes, revenge itself may become a weariness, but that uncompromising sense of necessity and justice which armed your and Haldin's hand to strike down that fanatical brute . . . for it was that—nothing but that! I have been thinking it out. It could have been nothing else but that."

Razumov made a slight bow, the irony of which was concealed by an almost sinister immobility of feature.

"I can't speak for the dead. As for myself, I can assure you that my conduct was dictated by necessity and by the sense of—well—retributive justice."

"Good that," he said to himself, while her eyes rested upon him, black and impenetrable like the mental caverns where revolutionary thought should sit plotting the violent way of its dream of changes. As if anything could be changed! In this world of men nothing can be changed—neither happiness nor misery. They can only be displaced at the cost of corrupted consciences and broken lives—a futile game for arrogant philosophers and sanguinary triflers. Those thoughts darted through Razumov's head while he stood facing the old revolutionary hand, the respected, trusted, and influential Sofia Antonovna whose word had such a weight in the "active" section of every party. She was much more representative than the great Peter Ivanovitch. Stripped of rhetoric, mysticism, and theories, she was the true spirit of destructive revolution. And she was the personal adversary he had to meet. It gave him a feeling of hardly triumphant pleasure to deceive her out of her own mouth. The epigrammatic saying that speech has been given to us for the purpose of concealing our thoughts came into his mind. Of that cynical theory this was a very subtle and a very scornful application, flouting in its own words the very spirit of ruthless revolution, embodied in that woman with her white hairs and black

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eyebrows like slightly sinuous lines of Indian ink traced upward from the two heavy perpendicular folds of a thoughtful frown.

"That's it. Retributive. No pity," was the conclusion of her silence. And this once broken, she went on impulsively in short, vibrating sentences.

"Listen to me, Razumov! . . ." Her father was a clever, but unlucky artisan. No joy had lighted up his laborious days. He died at fifty. All the years of his life he had panted under the thumb of masters whose rapacity exacted from him the price of the water, of the salt, of the very air he breathed; taxed the sweat of his brow and claimed the blood of his sons. No protection, no guidance! What had society to say to him? Be submissive and be honest. If you rebel I shall kill you. If you steal I shall imprison you. But if you suffer I have nothing for you—nothing except, perhaps, a beggarly dole of bread—but no consolation for your trouble, no respect for your manhood, no pity for the sorrows of your miserable life.

And so he labored, he suffered, and he died. He died in the hospital. Standing by the common grave, she thought of his tormented life—she saw it whole. She reckoned the simple joys of life, the birthright of the humblest, of which his gentle heart had been robbed by the crime of a society which nothing can absolve.

"Yes, Razumov," she went on in an impressive, lowered voice, "it was like a lurid light in which I stood still almost a child and cursed not the toil, not the misery which had been his lot, but the great social iniquity of the system resting on unrequited toil and unpitied sufferings. From that moment I was a revolutionist."

Razumov, trying to raise himself above the dangerous weaknesses of contempt or compassion, had preserved an impassive countenance. She, too, stood quiet before him, and with an uneffected touch of mere bitterness, the first he could notice since he had come in contact with the woman, she went on:

"As I could not go to the church where the priests of the system exhorted such unconsidered vermin as I to resignation, I went to the secret societies as soon as I knew how to find my way. I was sixteen years old—no more, Razumov! And—look at my white hair."

In these last words there was neither pride nor sadness. The bitterness, too, was gone.

"And long! There is a lot of it. I had always magnificent hair even as a chit of a girl. Only at that time we were cutting it short and thinking that there was the first step toward crushing the social infamy. Crush the infamy! A fine watchword. I would placard it on the walls of prisons and palaces, carve it on hard rocks, hang it out in letters of fire on that empty sky for a sign of hope and terror—a portent of the end. . . ."

"You are eloquent, Sofia Antonovna," Razumov interrupted, suddenly. "Only so far you seem to have been writing it in water. . . ."

She was checked, but not offended. "Who knows? Very soon it may become a fact written all over that great land of ours," she hinted, meaningly. "And then one would have lived long enough. White hair won't matter."

Razumov looked at her white hair: and this mark of so many uneasy years seemed nothing but a testimony to the invincible vigor of revolt. It threw out into an astonishing relief the unwrinkled face, the brilliant

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black glance, the upright compact figure, the simple, brisk, self-possession of the mature personality, as though in her revolutionary pilgrimage she had discovered the secret not of everlasting youth, but of everlasting endurance.

"How un-Russian she looks!" thought Razumov. Her mother might have been a Jewess or an Armenian or—devil knew what. He reflected that a revolutionist is seldom true to the settled type. All revolt is the expression of strong individualism—ran his thought, vaguely. One can tell them a mile off in any society, in any surroundings. It was astonishing that the police . . .

"We shall not meet again very soon, I think," she was saying. "I am leaving to-morrow."

"For Zurich?" Razumov asked, casually, but feeling relieved, not from any distinct apprehension, but rather from a feeling of stress as if after a wrestling-match. That was over!

"Yes, Zurich—and farther on, perhaps, much farther. Another journey. When I think of all my journeys! The last must come some day. Never mind, Razumov, we had to have a good long talk. I am glad we had it, like this, here, unexpectedly. But I would have certainly tried to see you if we had not met. Peter Ivanovitch knows where you live? Yes. I meant to have asked him—but it's better like this. You see, we expect two more men, and I had much rather wait here with you than up there at the house with . . ."

Having cast a glance beyond the gate, she interrupted herself. "Here they are," she said, rapidly. "Well, Kirylo Sidorovitch, we shall have to say good-by."

CHAPTER XII

In his incertitude of the ground on which he stood Razumov felt perturbed. Turning his head quickly, he saw two men standing as if rooted on the opposite side of the road. They were staring. It looked as though they had been thus engaged for some time, but, seeing themselves noticed by Sofia Antonovna, they crossed the road at once and passed one after the other through the little gate by the side of the empty lodge with its nailed door and boarded windows. They looked hard at the stranger, but without mistrust, the crimson blouse making it all safe like a flaring signal on a dark wall. The first, great white hairless face, double chin, prominent stomach, which he seemed to carry forward consciously within a strongly distended overcoat, only nodded and averted his eyes peevishly; his companion, lean, flushed cheek-bones, a military red mustache below a sharp, salient nose, approached at once Sofia Antonovna, greeting her warmly. His voice was very strong, but inarticulate. It sounded like a deep buzzing. The woman revolutionist was quietly cordial. Peter Ivanovitch had summoned her, too. No—she was not looking out for them, precisely. She had stopped for a talk. . . .

"This is Razumov," she announced in a clear voice.

The new-comer made an eager half-turn. "He will want to embrace me," thought our young man, with a deep recoil of all his being, while all his limbs seemed too heavy to move. But it was a groundless alarm. He had to do now with a generation of conspirators which did not kiss each other on both cheeks; and, raising an arm that felt like lead, he dropped

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his hand into a largely outstretched palm fleshless and hot as if dried up by fever, giving a bony pressure, expressive, seeming to say, "Between us there's no need of words."

The man with the red mustache had clear, wide-open eyes. Razumov fancied he could see a smile behind their sadness.

"This is Razumov," Sofia Antonovna repeated, loudly, for the benefit of the fat man, who, motionless at some distance, displayed the profile of his stomach, with his enormous thick hands hanging down lifelessly.

No one moved. Everything—sounds, attitudes, movements, and immobility—seemed to be part of an experiment whose result was a thin voice piping with comic peevishness.

"Oh yes! Razumov. We have been hearing of nothing but Mr. Razumov for months. For my part, I confess I would rather have seen Haldin on this spot instead of Mr. Razumov."

The squeaky stress put on the name "Razumov—Mr. Razumov" pierced the ear ridiculously like the falsetto of a circus clown firing off the beginning of an elaborate joke. Astonishment was Razumov's first response, followed by a sudden giddiness that lifted him up into an illusion of a great height. From this dangerous eminence he heard the other two exclaiming, then found himself down among them without a shock and without range of the voices.

"What's the meaning of *this*?" he asked in a stern tone, feeling the ground firm under his feet.

"Tut! Silliness. He's always like that." Sofia Antonovna was obviously vexed. But she dropped the explanation "Necator" from her lips casually, just loud enough to be heard by Razumov. The abrupt squeaks of the fat man seemed to proceed from that thing like a balloon he carried under his overcoat. The stolidity of his attitude, the big feet, the lifeless, hanging hand, the enormous bloodless cheek, the thin wisps of hair straggling down the fat nape of the neck, fascinated Razumov into a stare on the verge of horror and laughter.

(To be Continued)

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himself to his large reading public in America as well as in England. His verse appeared in collected form in 1909, but his most recently published work is *John Ruskin: A Study in Personality.* The essay in the current REVIEW is the last of a series which have appeared from time to time through the past year.

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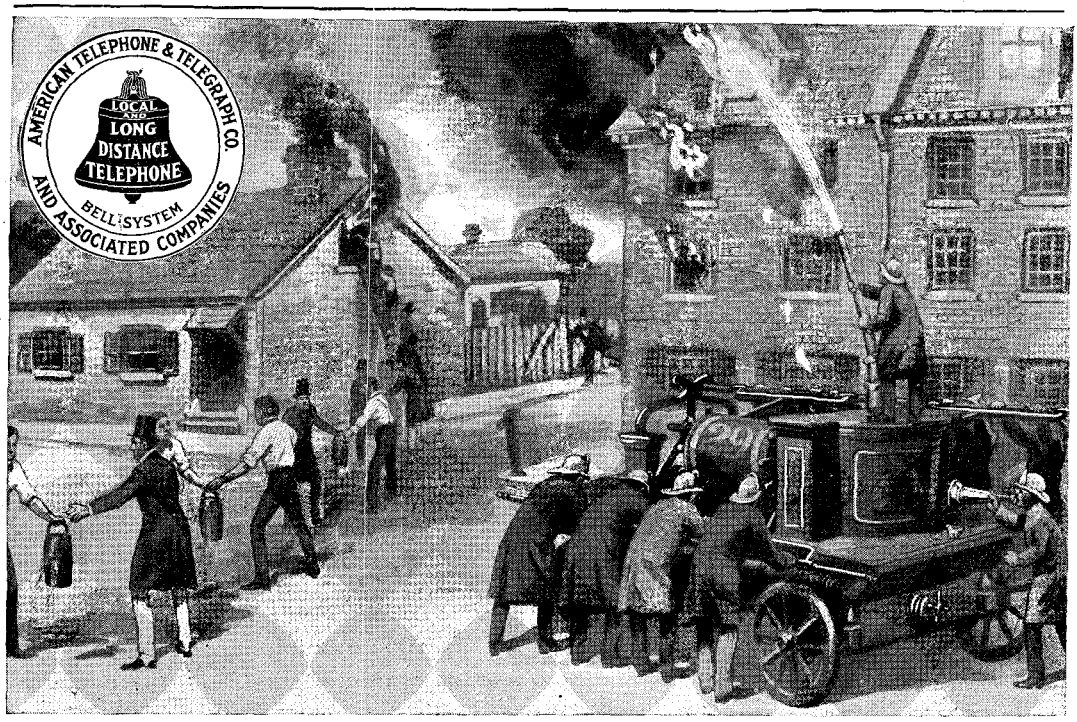

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